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IN THE

Supreme Court of the United States

MAJOR GENERAL JAMES H. LIPSCOMB III, in his official capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as Executive Head of the Mississippi Military Department and the Mississippi Militia, the Mississippi National Guard and the Mississippi Military Department,

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region and LINDA J. NORWOOD, in her former official capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Federal Labor Relations Authority has the power to order state National Guards and their state Adjutants General* to participate in federal union representation elections concerning Guard personnel.

Whether the valuable Tenth and Eleventh Amendment rights of a state official and a state agency may be trumped by federal statute, when Congress lacks the constitutional authority to pierce those immunities with its Article I powers.

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* Adjutants General are the senior military commanders of each state's National Guard. They are the National Guard analogue to the Chairman of the Joint Chiefs of Staff in the federal military. For the convenience of the Court, a Wire Diagram reflecting the relationship of the various military entities and persons at issue herein is included at App. J, 117a.

LIST OF PARTIES

Parties to the proceedings are those listed in the caption, to wit:

PETITIONERS:

Major General James H. Lipscomb III, in his official capacities as: the Adjutant General of the State of Mississippi; of the Mississippi Militia; of the Mississippi National Guard; and as Executive Head of the Mississippi Military Department

The Mississippi Militia

The Mississippi National Guard

The Mississippi Military Department

RESPONDENTS:

Federal Labor Relations Authority

Nancy Speight, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region

Linda J. Norwood, in her former official capacity as acting Regional Director of the Federal Labor Relations Authority, Atlanta Region

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Major General James H. Lipscomb III, in his official capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as Executive Head of the Mississippi Military Department and the Mississippi Militia, the Mississippi National Guard and the Mississippi Military Department,

respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App. B, 3a) is reported at 333 F.3d 611 (5th Cir. 2003).

The district court opinion (App. D, 22a) is reported at 200 F.Supp.2d 650 (S.D. Miss. 2001).

JURISDICTION

The judgment and opinion of the Court of Appeals affirming the district court in favor of Respondents was entered on June 24, 2003. App. B, 3a. A timely Petition for Rehearing En Banc, as well as a Petition for Panel Rehearing was filed by the Petitioners in the Fifth Circuit on July 30, 2003. On August 22, 2003, the Fifth Circuit denied both Petitions. App. A, 1a.

The jurisdiction of this Court is timely invoked by Petitioners pursuant to 28 U.S.C. § 1254(1). Petitioners, Plaintiffs below, invoked federal question jurisdiction in the district court to review a complaint for declaratory and injunctive relief concerning alleged violations of federal statutes and the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. X, which provides in part: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." App. F, 50a.

U.S. Const., amend. XI, which provides in part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." App. F, 50a.

Miss. Const. art. V, § 119, which provides in part: "The governor shall be commander-in-chief of the army and navy of the state, and of the militia, except when they shall be called into the service of the United States." App. G, 51a.

5 U.S.C. § 1204(a)(2), is reproduced in App. H, 52a.

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5 CFR § 2421.4, is reproduced in App. H, 70a.

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Miss. Code Ann. § 33-5-1, is reproduced in App. H, 72a.

STATEMENT OF THE CASE

A. Proceedings and Disposition in the Lower Courts.

This case involves the coercive acts of federal instrumentality, the Federal Labor Relations Authority ("FLRA"), against a state agency, the Mississippi National Guard ("Mississippi Guard") and its Adjutant General, who is a state official. 66a, 71a. At the urgence of a private union, Association of Civilian Technicians, the FLRA ordered the Mississippi Guard and its Adjutant General to submit to its federal power and to hold a federal union election concerning Mississippi Army National Guard Technicians ("Military Technicians"), a type of Guard personnel who work for the Guard full-time under 32 U.S.C § 709. 6a, 104a-109a.

After exhausting administrative remedies, on July 24, 2001, Petitioners filed the instant civil Action. App. I, 73a. Petitioners seek only equitable relief and contend that Respondents are acting in excess of their statutory powers and are violating these state actors' Tenth and Eleventh Amendment constitutional rights. 73a.

On December 19, 2001, the district court issued a memorandum opinion and order denying Respondents' motion to dismiss for lack of subject matter jurisdiction, denying Petitioners' motion for a preliminary injunction and/or for summary judgment, and granting Respondents summary judgment. App. D, 22a.

On the merits, the district court rejected Petitioners' statutory construction arguments, and found the Mississippi Guard to be a federal executive "agency" when administering Mississippi Army National Guard Military Technicians under 5 U.S.C. § 7103(a)(3), of the Federal Service Labor-Management Relations Act ("Labor Management Act"). 40a. In reaching this conclusion, the district court mistakenly found the Mississippi Guard to be a subpart of the federal National Guard of the United States, which is a

federal reserve component under 10 U.S.C. § 10101. 40a. The district court further concluded that this putative federal agency status trumped Petitioners' Tenth and Eleventh Amendment rights, allowing the court to avoid addressing them altogether. 44a-45a n.15.

On January 8, 2002, the district court entered a final judgment effectuating its prior opinion and order. App. C, 19a. On January 11, 2002, Petitioners timely filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit.

The judgment and opinion of the Court of Appeals affirming the district court in favor of Respondents was entered on June 24, 2003. App. B, 3a. In its decision, the Fifth Circuit panel affirmed the district court's rulings. 18a.

A timely Petition for Rehearing En Banc, as well as a Petition for Panel Rehearing, was filed by Petitioners in the Fifth Circuit. On August 22, 2003, the Fifth Circuit denied both Petitions, and this Petition follows. App. A, 1a.

B. Facts.

For the convenience of the Court, a Wire Diagram reflecting the relationship of the various military entities and persons at issue herein is included at App. J, 117a.

Petitioner the Mississippi Militia, of which Petitioner the Mississippi Guard is a subset, is composed of the "[n]ational guard, the Mississippi State Guard,[1] and the unorganized militia." Miss. Code Ann. § 33-5-1. App. H, 72a. Pursuant to Miss. Code Ann. § 33-1-1(d) the "Mississippi National

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[1] The Mississippi State Guard - an entity separate and distinct from the Mississippi Guard (Petitioner here) - is a state defense force exempt from being impressed into the Armed Forces of the United States. *See* 32 U.S.C. § 109(c); *see also Perpich*, 496 U.S. at 352 (discussing state defense forces). Essentially, the Mississippi State Guard is available to take up state duties for the Mississippi Guard, in case the Mississippi Guard deploys out of state.

Guard [means] that part of the organized militia of this state which is organized, equipped and federally recognized under the provisions of the laws of the United States and of the State of Mississippi relating to the National Guard." *Id.*

The Governor of Mississippi, not the President of the United States, is the Commander in Chief of the Mississippi Guard (unless impressed into federal service). Miss. Code Ann. § 33-3-1; Miss. Const. art. V, § 119. 51a. This is because, unless called forth by the President, the respective states' National Guards are state militias, not federal military entities. *Perpich v. DOD*, 496 U.S. 334, 350-51 (1990) (discussing the three "hats" worn by Guardsmen and recognizing that the militias are state entities); *Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999) (holding that both the New York military department and National Guard are state entities entitled to Eleventh Amendment immunity). 111a.

Likewise, the Mississippi Military Department is a department of the executive branch of the State of Mississippi, Miss. Code. Ann. § 33-3-3 (1972), and therefore also a state agency. *Id.* 71a. Essentially, the Mississippi Military Department is the Mississippi state analogue to the federal Department of Defense. In other words, it is the state agency that administers the various parts of the Mississippi Militia.

The Adjutant General is a *state*, not federal, officer. Under state law, the Adjutant General is the "[e]xecutive head of the [Mississippi Military] department, and, as such, subordinate only to the governor in matters pertaining thereto." *Id.*; *see* 32 U.S.C. § 314 (state law sets duties of the Adjutant General); *see also* Miss. Const. art. V, § 119; Miss. Code Ann. § 33-3-1. 71a. In addition to serving as the executive head of the Mississippi Military Department, a state agency, the Adjutant General is the chief military officer of the various parts of the Mississippi Militia, including the Mississippi Guard, and is "[s]ubordinate only to the Governor

in matters affecting the . . . militia of this state." Miss. Code Ann. § 33-3-7 (1972). 71a. The Adjutant General is therefore a state militia officer, as well as a state agency head. *See NeSmith v. Fulton*, 615 F.2d 196, 199 (5th Cir. 1980) ("[t]he legislative history of the National Guard Technicians Act also states clearly that Congress viewed the adjutants general as state officers").

As described below in Section I, the Mississippi Guard can have a federal capacity, but only when impressed into federal service by the President. It is undisputed that such did not occur during any of the time periods at issue. Rather, the district court and the Fifth Circuit confused and conflated the Mississippi Guard with a separate federal reserve component entity - the National Guard of the United States - a shell entity populated from time to time with Guardsmen who leave their state National Guard and go onto federal military orders as *individual* soldiers and airmen. *See generally Perpich v. DOD*, 496 U.S. 334, 345-49 (1990) (explaining the purpose and use of National Guard of the United States).

In a typical active component unit in the United States Armed Forces, the unit is able to function year round through the utilization of active duty soldiers, sailors, marines and airmen. 103a. However, as "traditional" or mobilization-day ("M-day") Guardsmen normally perform their duties only on a part-time basis, the Mississippi Guard, like every other state's Guard, must have certain full-time personnel to staff and maintain operations year-round. App. I, 103a-104a.

Decades ago, the States, as well as Congress, recognized this need, and together they created a variety of positions staffed by a variety of personnel to run each state's Guard operations when its "traditional" (part-time) Guardsmen are away at their civilian occupations. 103a. In that regard, the Mississippi Guard, and its concomitant state agency, the Mississippi Military Department, Miss. Code Ann. § 33-5-1, thus utilize a variety of personnel in the accomplishment of

its mission. 103a. One category of military capacity full-time personnel used by Petitioners is 32 U.S.C. § 709 excepted service technicians (Military Technicians). 104a. These Military Technicians are M-day Guardsmen who also hold a full-time position with the Mississippi Guard as nominal federal employees. 104a.

Military Technicians are required to be a member of the Mississippi Guard, to wear their military uniform in the performance of their technician duties, to observe military courtesy and protocol, and to perform duties that are military in nature. 104a. Under 32 U.S.C. § 709, Military Technicians answer solely to their state Adjutant General.

Whether the FLRA may lawfully and constitutionally compel *Petitioners* - who are state actors - to participate in the federal Labor Management Act with respect to their Military Technicians is the central dispute that led to the filing of this case. Importantly, the focus of this case is on the status of the *Mississippi Guard* and its *Adjutant General*, not that of the Military Technicians themselves.

As *Petitioners* do not meet the definition of a federal executive "agency" as set forth by 5 U.S.C. § 7103(a)(3) or of an "activity" under 5 CFR § 2421.4, they are simply not subject to the jurisdiction of, or compulsory commands by, the FLRA. Additionally, even if they did, the application of the Labor Management Act to Petitioners would violate Petitioners' valuable Tenth and Eleventh Amendment rights.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case for three reasons. First, this case presents an issue of national importance, whether the FLRA has the power to order state National Guards and their state Adjutants General to participate in federal union representation elections concerning Guard personnel, and the unintended and negative national security

consequences flowing from the Fifth Circuit's affirmative resolution of that question. Second, the Fifth Circuit's decision is contrary to numerous Tenth and Eleventh Amendment federalism decisions of this Court, and at a minimum exposes new, difficult and important issues created by the intersection of the Technicians Act, *Perpich v. DOD*, 496 U.S. 334, 345 (1990) and *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002). Third, the Fifth Circuit's decision conflicts with the decisions of at least five other Circuits.

The Fifth Circuit's decision that state National Guards and their state Adjutants General are subject to the commands of the Federal Labor Relations Authority, and must submit to federal union representation elections concerning their Military Technician personnel warrants this Court's review. Not only does the Fifth Circuit's decision conflict with *Perpich v. DOD*, 496 U.S. 334, 345 (1990), it also threatens to harm our federal system, as it is important to the interworkings of the Guard and the Active Components that the distinctions of authority and jurisdiction between the federal military and each state's militia be maintained. Additionally, the Fifth Circuit's holding that the Mississippi Guard is a federal agency and part of the National Guard of the United States - a federal reserve component - threatens to criminalize the use of the Mississippi Guard for counter-terrorism and domestic law enforcement operations under the *Posse Comitatus* Act, 18 U.S.C. § 1385, at a time when this Nation is at war on post-911 soil. App. E, 48a, 61a.

Moreover, the Fifth Circuit's opinion ignores this Court's recent federalism rulings in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), *Printz v. United States*, 521 U.S. 898, 935 (1997) and *South Carolina State Ports Authority*, 535 U.S. at 760. For example, in a finding directly contrary to *Printz*, the Fifth Circuit found that a putative statutory designation of the Adjutant General as a federal agent vitiated Petitioners'

valuable Tenth and Eleventh Amendment rights. The Fifth Circuit made such a finding in violation of the Plain Statement Rule, and despite the fact that under *Kimel v. Florida Board of Regents*, 528 U.S. 62, 78 (2000), Congress lacks any authority under its Article I powers to pierce a state actor's sovereign immunity. At a minimum, the decision below deserves this Court's attention so that it may address the new, difficult and important issues created by the intersection of the Technicians Act, *Perpich*, 496 U.S. at 345 and *South Carolina State Ports Authority*, 535 U.S. at 760, which the Fifth Circuit failed to reconcile.

Finally, the Fifth Circuit's opinion is in conflict with the Federal Circuit's recent decision in *Clark v. United States*, 322 F.3d 1358, 1368 (Fed. Cir. 2003), which found the Alabama National Guard to be a state agency and an entity separate and distinct from the National Guard of the United States, a federal reserve component. It is also in conflict with First, Second, Third, Fourth, Seventh and Tenth Circuit decisions, all of which have recognized and protected the Eleventh Amendment immunity of a state Guard or its Adjutant General. *See Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 686 (1st Cir. 1999); *Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 n.3 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993) (citing *Meadows v. State of Ind.* 854 F.2d 1068, 1069 (7th Cir. 1988)); *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1493 (10th Cir. 1983); *Hefrich v. Pennsylvania Dept. of Military Affairs*, 660 F.2d 88, 90 (3rd Cir. 1981); *Henry v. Textron, Inc.*, 577 F.2d 1163, 1164 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978).

Additionally, the Fifth Circuit's decision conflicts with *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331, 1333 (Fed. Cir. 2001), in which the Federal Circuit found that as a state Adjutant General is not a federal employee, he

therefore is not subject to the commands of federal administrative agencies while serving in a state status. Finally, the Fifth Circuit's finding that the Adjutant General can act in a federal capacity when in a state status is contrary to *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999) and *United States v. Hutchings*, 127 F.3d 1255, 1258-59 (10th Cir. 1997), both of which found that Guardsmen hold a state capacity unless command authority has been taken away from the Governor and transferred to the President.

I. THE FIFTH CIRCUIT'S FINDING THAT A STATE ADJUTANT GENERAL AND STATE NATIONAL GUARD ARE FEDERAL EXECUTIVE AGENCIES IS CONTRARY TO *PERPICH* AND WILL HAVE UNINTENDED CONSEQUENCES DETRIMENTAL TO THE CONSTITUTIONAL BALANCE AND NATIONAL SECURITY.

The central question in this case is whether the FLRA - a federal instrumentality - may constitutionally dragoon two state actors - a state Adjutant General and National Guard - to unwillingly participate in a federal regulatory program. Ignoring *Perpich v. DOD*, 496 U.S. 334, 345 (1990), as well as the Guard statutory scheme, the Fifth Circuit found that the Mississippi Adjutant General and the Mississippi Guard are federal/state "hybrids," a finding that infects the entire decision and allowed the Fifth Circuit to avoid addressing the major constitutional issues in this case. 6a, 14a-15a n.7.

Specifically, the Fifth Circuit made a fundamental error in holding "[t]hat the AG . . . [and] the MSNG[,] . . . are federal executive agencies . . . , and consequently subject to the jurisdiction of the FLRA." 4a. The Fifth Circuit based this holding on its finding that the Adjutant General and MSNG are "hybrid[s]" - *simultaneously* holding a state and federal status. 6a. However, under controlling federal statutes and

case law, the Adjutant General and the Mississippi Guard have *dual* and mutually exclusive statuses, which is something entirely different from being *hybrids*.

Without so explicitly stating, the Fifth Circuit appears to have employed common law agency principles in its analysis of whether the Adjutant General and the Mississippi Guard are federal Executive agencies. Yet the instant inquiry is not about common law agency principles—rather, it is about whether the Titles 10 and 32 statutory scheme, coupled with the literal language of 5 U.S.C. § 7103(a)(3) and 5 CFR § 2421.4, render the Adjutant General and the Mississippi Guard "[a]n Executive agency" or "[a]ctivity" of an "[a]n Executive agency." 52a, 70a.

In the context of the Guard, Congress has set forth a very carefully crafted statutory scheme which delineates and distinguishes the rights of the States and the Federal Government. This scheme is one premised in large part on important constitutional boundaries of authority—necessitated by the respective spheres of the two Militia Clauses and the War Powers Clause. It is that carefully crafted statutory scheme - not common law agency principles - that must be dispositive. With that premise, the Fifth Circuit's holding - and its underlying rationale - are mistaken for the following reasons, all of which counsel for the grant of a writ of certiorari.

First, the Titles 10 and 32 Guard statutory scheme make it clear that the Adjutant General and the Mississippi Guard's status at any given time *is a function of who has command authority*. Second, the Fifth Circuit's finding that the Adjutant General and the Mississippi Guard are "hybrids" 6a, that can *simultaneously* hold both a state and federal status, is contrary to the holding of *Perpich,* 496 U.S. 345-46, that Guardsmen cannot - as a matter of law - wear a state and a federal hat *at the same time*.

It is true that the Adjutant General, like any Guardsman, took *two* oaths. In his state capacity, he took an oath to the Mississippi Constitution, and enlisted in the Mississippi Guard, a state entity. In that status, as a matter of both state and federal constitutional law, he acts as a state - not federal - officer:

> It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States makes it apparent that military members of the Guard are employees of the States....

Maryland ex rel. Levin v. United States, 381 U.S. 41, 48 (1965), *vacated on other grounds*, 382 U.S. 159 (1965) (citing *Storer Broadcasting Co. v. United States*, 251 F.2d 268, 269 (5th Cir. 1958) ("[a]ll located decisions . . . hold that National Guardsmen of the several states are employees of the state except when in the actual service of the United States")); *accord Perpich*, 496 U.S. at 348 ("[i]ts constitutional aspect is [that] State Guard personnel . . . retain their state affiliation during their periods of service"); *see* 32 U.S.C. § 314 (state law sets duties of the Adjutant General); *see also* Miss. Const. art. V, § 119; Miss. Code Ann. § 33-3-1. 51a, 71a.

It is also true that the Adjutant General, like any Guardsman who holds federal recognition,[2] took a second oath - one to the United States Constitution - and enrolled as a member

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[2] "Federal recognition" merely means that a given Guardsman, in addition to membership in his state's Guard, *may* also be a member of the National Guard of the United States. *See* 32 U.S.C. § 301; *see also Zitser v. Walsh*, 352 F.Supp. 438, 440 (D. Conn. 1972)("One may be a member of the National Guard of a state without receiving federal recognition, but never the reverse").

of an organization separate and distinct from the Mississippi Guard - the National Guard of the United States, a federal reserve component. If actually serving in the National Guard of the United States, the Adjutant General would hold a federal status. However, the statutory scheme and Supreme Court precedent, make it clear that the Adjutant General's respective state or federal statuses are *mutually exclusive*.[3]

More particularly, when serving in the National Guard of the United States, the Adjutant General - like all Guardsmen - loses his state militia status and becomes a Title 10 federal soldier. *See* 10 U.S.C. § 12405 ("Members of the National Guard called into Federal service are, from the time when they are required to respond to the call, subject to the laws and regulations governing the Army or the Air Force, as the case may be . . ."). 58a. Furthermore, *Perpich* held that:

> Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. [B]ut *unless and until ordered to active duty in the Army, they retained their status as members of a separate State Guard unit. . . .*" *All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective States*, . . . and during such time shall be subject to such laws and regulations for the government of the Army of the United States. . . ." *Upon being relieved from active duty ...all individuals and units shall thereupon revert to their National Guard status*."

Perpich, 496 U.S. at 345-46 (emphasis added)(some citations omitted). Thus, Guardsmen "[n]ow must keep three hats in their closets - a civilian hat, a state militia hat, and an army hat - *only one of which is worn at any particular*

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[3] To the extent that *NeSmith v. Fulton*, 615 F.2d 196, 198 (5th Cir. 1980), can be read to the contrary, it has been overruled by *Perpich v. DOD*, 496 U.S. 334 (1990).

time." *Id.* at 348 (emphasis added). This is "dual" military status, not "hybrid" status.

Just as one cannot be a little bit pregnant, the Adjutant General cannot simultaneously be a little bit state and a little bit federal. This is because, in the context of the Guard, whether one is in a state or federal status "[d]epends ***solely*** on whether command of the Guardsman has been taken away from a state's governor by one authorized to do so by Congress." *United States v. Hutchings*, 127 F.3d 1255, 1258-59 (10th Cir. 1997) (emphasis added). The Adjutant General is either commanded by the Governor or the President, but *never* both.

Thus, while the Adjutant General certainly holds "dual" statuses, it is simply mistaken - and contrary to *Perpich* - to say he has a "hybrid" status—as found by the Fifth Circuit. *Compare* 13a ("[t]he hybrid character of the AG includes a federal component . . .) *with Perpich*, 496 U.S. at 348 (Guardsmen "[n]ow must keep three hats in their closets - a civilian hat, a state militia hat, and an army hat - *only one of which is worn at any particular time*") *and id.* at 349 (emphasis added) ("[t]he state affiliation is suspended in favor of an *entirely* federal affiliation during the period of active duty").[4] This strict and mutually exclusive duality is important, as the state status of nonfederalized Guardsmen is a "[c]onstitutional aspect" of their service. *Perpich,* 496 U.S. at 349.

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[4] Respondents offered no evidence whatsoever, and the Fifth Circuit did not purport to rely upon any, suggesting that the Adjutant General was serving in the National Guard of the United States during any of the time periods at issue in this Action. *See* 10 U.S.C. § 12401 (National Guard of the United States members "[a]re not in active Federal service except when ordered thereto under law"). 58a. In fact, the Adjutant General did not even hold federal recognition (National Guard of the United States membership) during part of the time at issue. 116a.

Likewise, the Mississippi Guard is not a federal Executive agency or activity. Unlike the National Guard of the United States, the Mississippi Guard is not (*and never is*) a federal reserve component under 10 U.S.C. § 10101.[5] 57a. Rather, under 10 U.S.C. § 101(c)(2), the Mississippi Guard is one of the "[o]rganized militia of the several States. . . ." *Id.* 54a. Admittedly, if the President uses his call power to impress the Mississippi Guard, it becomes part of the Army itself, under 10 U.S.C. § 3062(c), as the Army can include, "[t]he Army National Guard[6] *while in the service of the United States. . . .*" *Id.* (emphasis added). 60a. However, it is undisputed that the Mississippi Guard - the entity - was not impressed[7] during any of the time period at issue. In fact, during any time

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[5]Because federal law does not require a Guardsman to keep his federal recognition in order to remain in a state's Guard, *Zitser v. Walsh*, 352 F. Supp. 438, 440 (D. Conn. 1972), the National Guard of the United States can never contain a state's Guard (the entity), because such would subsume non-federally recognized Guardsmen into the National Guard of the United States, in violation of 10 U.S.C. § 10105. In that regard, Miss. Code Ann. § 33-3-7 does not even require the Adjutant General to hold federal recognition, so long as he is "[e]ligible to receive federal recognition." Mississippi has had periods of time when the then Adjutant General did not hold federal recognition. 116a. As a result, during those time periods (which included some of the time of Respondents' Labor Management Act proceeding), the Adjutant General could not have been a member of the National Guard of the United States as a matter of law.

[6] The federally recognized *parts* of the Mississippi Guard are part of the Army National Guard under 10 U.S.C. § 101(c)(2). 54a. However, the Army National Guard, like the Mississippi Guard, is not a federal reserve component under 10 U.S.C. § 10101. 57a.

[7] Certainly, significant numbers of Mississippi Guardsmen have been mobilized to federal active duty in recent years through their separate membership in the National Guard of the United States. However, the Mississippi Guard itself has not been impressed by Presidential call during the time period at issue. *See Perpich*, 496 U.S. at 350 n.21 (explaining the difference between Presidential impression of a state's Guard itself versus activation of individual National Guard of the United States members).

period when the Mississippi Guard assumes a federal status—*it no longer has any Military Technicians.* This is because upon impression of the Mississippi Guard, its Military Technicians lose their Technician status and become Title 10 soldiers and airmen, as the case may be.[8] 58a.

In other words, the respective States' Militias, (parts of which comprise the term "Army National Guard"), are separate legal entities and are never a part of the National Guard of the United States. Those state entities only become part of the "Army" when "[i]n the service of the United States. . . ," 10 U.S.C. § 3062(c)(1), when impressed by call under federal statutory authority. 60a. *E.g.*, 10 U.S.C. §§ 331-333 & 12406 (authorizing executive officials to call forth the militia of the States). 55a, 58a.

Thus, when in a state status, the Mississippi Guard is a state entity, under the command of the Governor. *E.g., Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999) (New York Guard is state entity). It only obtains a federal status when and if converted into part of the Army when impressed by Presidential call. 10 U.S.C. § 3062(c)(1); 10 U.S.C. §§ 331-333 & 12406; *Hutchings*, 127 F.3d at 1258-59. 55a, 58a. Absent such an impression, the Mississippi Guard is never a "federal" Executive agency under 5 U.S.C. § 7103(a)(3) or an "activity" of a federal Executive agency under 5 CFR § 2421.4 and cannot be a subjected to federal labor laws. 52a, 70a.

Because the Fifth Circuit found to the contrary, its decision threatens to warp the carefully crafted Congressional and constitutional scheme delineating the respective spheres of state versus federal military power. As evidenced by

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[8] *See* 10 U.S.C. § 12405 ("Members of the National Guard called into Federal service are, from the time when they are required to respond to the call, subject to the laws and regulations governing the Army or the Air Force, as the case may be. . ."). 58a.

Perpich, it is very important - as a matter of Federalism, as well as the interworkings of the Guard and the Active Components - that the distinctions of authority and jurisdiction between the federal military and each state's militia be maintained. Additionally, if left undisturbed, the Fifth Circuit's decision will harm national security.

Soberingly, this Nation is at war. Unlike any other war in recent history, the War on Terrorism is being fought not only overseas, but also - and tragically, as evidenced by the events of September 11 - on our own soil. Each state's National Guard is playing a critical role in this War.

Under the *Posse Comitatus* Act, it has long been accepted that the Guard - because it is not a *part* of the federal military - is not prohibited from engaging in domestic operations—including counterterrorism and law enforcement operations. For example, in the post-911 period, Guardsmen were detailed as security at airports nationwide. These Guardsmen served in a state status - as members of their respective states' Guards - so as not to run afoul of the *Posse Comitatus* Act. *See* (MS Exec. Order no. 850 (Sept. 28, 2001)), App. E, 48a.

However, the Fifth Circuit's holding that the Mississippi Guard is a federal agency and part of the National Guard of the United States, 15a-16a n.8 - a federal reserve component - threatens to criminalize the use of the Mississippi Guard for these and certain other domestic operations. This is because the *Posse Comitatus* Act prohibits the use of "[a]ny *part* of the Army or Air Force as a posse comitatus or otherwise to execute the laws. . . ." 18 U.S.C. § 1385 (emphasis added). 62a.

Under 10 U.S.C. § 3062(c), National Guard of the United States is indisputably *part* of the Army. 60a. Thus, if the Fifth Circuit's finding that the Mississippi Guard is a subpart of the National Guard of the United States stands, some may well contend that use of the Mississippi Guard for certain

domestic counterterrorism and law enforcement operations is a felony. *See Clark v. United States*, 322 F.3d 1358, 1367 (Fed. Cir. 2003) ("To include a National Guard member in a reserve component . . . when he is in service to the state National Guard would be to treat that member as a federal employee, and not as a state serviceman, and would be contrary to [Posse Comitatus]"). Such a result, especially with this Nation at war, would damage national security.

II. JOINT APPLICATION OF THE TECHNICIANS ACT, *PERPICH* AND *SOUTH CAROLINA PORTS AUTHORITY* PRESENTS IMPORTANT ISSUES OF FEDERALISM NOT YET ADDRESSED BY THIS COURT.

It is well established that, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). This "plain statement" rule is not met by a mere "general authorization for suit in federal court. . . ." *Scott v. Univ. of Miss.*, 148 F.3d 493, 499 (5th Cir. 1998), *abrogated on other grounds by Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). Rather, both the text and structure of the statute must "make[] it clear that the State is the [intended] Defendant in the suit." *Id.*

The Adjutant General - a state officer - and the Mississippi Guard - a state entity - are entitled to sovereign immunity under the Eleventh Amendment,[9] and their immunity extends

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[9] *See Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 686 (1st Cir. 1999); *Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 n.3 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993)(citing *Meadows v. State of Ind.*, 854 F.2d 1068, 1069 (7th Cir. 1988)); *Hefley v. Textron,*

to federal administrative proceedings - like those at issue here - that are initiated by private parties such as Association of Civilian Technicians, a union. *E.g., Federal Mar. Comm. v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002) ("[s]tate sovereign immunity bars [federal administrative agencies, like the FLRA] from adjudicating complaints filed by a private party against a nonconsenting State").

Here, the Fifth Circuit found the Adjutant General and the Mississippi Guard to have no Eleventh Amendment immunity—implicitly holding that such had been pierced through Congress' putative designation of them as federal Executive agencies or activities under the Technicians Act. 14a-15a n.7. However, the Fifth Circuit itself *repeatedly* admits that there is *no* plain statutory statement by Congress, reflecting any intent to pierce these state actors' immunities.

For example, the decision's operative portion states that upon review of the actual statutory language - which of course should control the outcome - "[w]e begin to get into a thicket. . . ." 9a. Maneuvering through that "thicket," the Fifth Circuit then "[f]ind[s] that the broad and somewhat circular terms of the statutory definitions of agency and Executive agency are *non-dispositive* in resolving the specific question that this appeal presents." 12a-13a n.6 (emphasis added).

This finding is not surprising, as if the Fifth Circuit had found the actual statutory words dispositive, the Fifth Circuit implicitly concedes it would have to rule the other way:

Inc., 713 F.2d 1487, 1493 (10th Cir. 1983); *Hefrich v. Pennsylvania Dept. of Military Affairs*, 660 F.2d 88, 90 (3rd Cir. 1981); *Henry v. Textron, Inc.*, 577 F.2d 1163, 1164 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978); *Richardson-Longmire v. Kansas, Adjutant General*, no. Civ.A.97-2679, 1997 WL 156168 (D. Kan. March 8, 1999); *Petr v. Delaware Nat'l Guard*, Case No. 94-327-SLR, 1995 WL 579634 (D. Del. Sept. 28, 1995); *Intrioni v. South Carolina Nat'l Guard*, 828 F.Supp. 391, 396 (D. S.C. 1993).

"[w]e must admit that if one is searching for translucent, definitional, statutory words under the Labor Management Act stating that the entities composing the [Mississippi Guard] constitute an 'Executive agency,' the search will be disappointing." 13a. A "thicket" is not a "plain statement."

Additionally, even if there was a plain statement - which there is not - Congress must have constitutional authority to pierce a state's Eleventh Amendment immunity. Here, Congress could not pierce Petitioners' immunity as the Militia Clauses are part of Article I of the Constitution and "[C]ongress lacks power under Article I to abrogate the States' sovereign immunity." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000). The Fifth Circuit's opinion ignores this black letter rule of law.

In *Perpich v. DOD*, 496 U.S. 334, 345, 350 n.21 (1990), this Court made it clear that state National Guards are state agencies, unless impressed into federal service by Presidential call. Further, this Court made it clear that Guardsmen are not in federal service merely because they hold a separate membership in the National Guard of the United States. *Id.* at 345. These holdings should have entitled the Mississippi Guard and its Adjutant General to the full benefits of this Court's Eleventh Amendment case law, including *Gregory*, 501 U.S. at 460, *Kimel*, 528 U.S. at 78 and *South Carolina State Ports Authority*, 535 U.S. at 760.

However, employing the Technicians Act, 32 U.S.C. § 709, in a context to which it does not apply - federal unionization proceedings - the Fifth Circuit found that the Adjutant General's putative status as a federal agent in administering his Military Technicians somehow converted him into a federal "Executive agency" under an entirely different federal statutory scheme, the Labor Management Act. 18a. Ignoring not only the Plain Statement Rule, but also this Court's explanation of the state nature of the Guard and its personnel in *Perpich*, the Fifth Circuit thereafter found the Labor

Management Act to trump Petitioners' Eleventh Amendment rights. 14a-15a n.7. Petitioners therefore respectfully submit that certiorari should be granted to address the intersection of the Technicians Act, *Perpich* and *South Carolina State Ports Authority*, as these new, difficult and important federalism issues were incorrectly decided by the Fifth Circuit in a manner that will harm our federal system.

III. THE FIFTH CIRCUIT'S DECISION THAT PETITIONERS' PUTATIVE FEDERAL AGENCY STATUS TRUMPS THEIR TENTH AMENDMENT IMMUNITY IS CONTRARY TO *PRINTZ*.

The Fifth Circuit gave short shrift to the Petitioners' Tenth Amendment rights. Relegating Petitioners' important constitutional rights to a mere footnote, the Fifth Circuit found that those rights do not attach as "[t]he conclusion that the AG is a federal agency, subject to the [Labor Management Act] in its federal capacity, renders *Printz* inapposite." 14a-15a n.7. This conclusion is mistaken, because as discussed in detail above, neither the Mississippi Guard nor the Adjutant General are "[a]n Executive Agency" under 5 U.S.C. § 7103(a)(3). 52a. In any event, and quite importantly to the instant appeal, *even if* either or both of them were a statutory federal "agent" with respect to Military Technicians under 32 U.S.C. § 709, such would not change the constitutional inquiry. 67a.

In *Printz v. United States*, 521 U.S. 898, 935 (1997), a federal statute, 18 U.S.C. § 922, *specifically* designated state law enforcement officers to administer part of the Brady Act. *Printz*, 521 U.S. at 903. 61a. That explicit federal statutory designation arguably made them statutory federal "agents." Despite this fact, it did not in any way vitiate those state officials' Tenth Amendment immunities, and this Court had no hesitation in holding that:

> Congress cannot compel the States to enact or enforce a federal regulatory program. [Further,] Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may [not] command the States' officers ...to administer or enforce a federal regulatory program.

Printz, 521 U.S. at 935.

Here, Respondents are doing exactly what this Court prohibited in *Printz*. By coercively dragooning the Mississippi Guard and its Adjutant General to enforce a federal regulatory program - the Labor Management Act - they are violating the Tenth Amendment. 50a, 104a, 108a.

Simply put, the Fifth Circuit's reasoning that 5 U.S.C. § 7103(a)(3) of the Labor Management Act trumps Petitioners' Tenth Amendment rights is contrary to *Printz*. It is circuitous to argue that since involuntary statutory conscription of a state actor through the Labor Management Act would render him a federal agent, the resulting agency status constitutionally immunizes the underlying conscription. This very reasoning was rejected in *Printz*, a case which - unlike here - had an *explicit* federal statutory conscription of a state official.

Here, the Respondents, at the behest of Association of Civilian Technicians, a private party, are seeking to conscript the Petitioners into administering and participating in a federal regulatory scheme, the Labor Management Act. 104a-108a. However, under *Printz,* such a commandeering is unconstitutional. Petitioners respectfully submit that this Court should grant certiorari to clarify the rule in *Printz*—that Congress may not obviate the constitutional prohibition on involuntary conscription of state officers by means of a federal statutory mandate.

IV. THE FIFTH CIRCUIT'S OPINION HAS CREATED SPLITS BETWEEN THE CIRCUITS.

Not only is the Fifth Circuit's decision contrary to this Court's decisions in *Perpich*, 496 U.S. at 345-46, *Gregory*, 501 U.S. at 460, *Kimel*, 528 U.S. at 78, *Printz*, 521 U.S. at 935 and *South Carolina*, 535 U.S. at 760, it further has created splits between the Circuits on a number of issues.

First, in *Clark v. U.S.*, 322 F.3d 1358 (Fed. Cir. 2003), the Federal Circuit analyzed one of the key issues also in the instant case - the relationship between a state Guard and the separate and distinct federal entity the National Guard of the United States. *Clark* found:

> Although the National Guard of the United States is a reserve component, the Alabama National Guard, . . . is not a reserve component of a uniformed service. It becomes clear, when we consider Supreme Court precedent and the statutory scheme . . . , that the National Guard and the National Guard of the United States are separate and distinct entities.
>
> . . . .
>
> Case law thus establishes that when National Guard members are not activated into federal service, they are not treated as federal employees.
>
> . . . .
>
> In short, National Guard members are only serving in the federal military when they are called into formal military service.

Clark, 322 F.3d at 1365, 1366 & 1368.

Contrary to *Clark*, the Fifth Circuit decision in this case adopted the district court's finding that the Mississippi Guard is a subpart of the National Guard of the United States, 15a-16a n.8, not an entity which is "separate and distinct" as found by the Federal Circuit in *Clark*. Further, and also

contrary to *Clark*, the Fifth Circuit decision effectively treats the Adjutant General as a federal employee, even when he is "not activated into federal service. . . ." *Clark*, 322 F.3d at 1368. 18a.

Clark is not the only Circuit decision in conflict with the instant case. By finding that Petitioners were federal agencies or activities, 16a, the Fifth Circuit found Petitioners to have no Eleventh Amendment immunity. However, First, Second, Third, Fourth, Seventh and Tenth Circuit decisions - contrary to the result here - all have recognized the Eleventh Amendment immunity of a state Guard. *See Day v. Massachusetts Air Nat'l Guard,* 167 F.3d 678, 686 (1st Cir. 1999); *Jones v. New York State Div. of Military Affairs*, 166 F. 3d 45, 49 (2d Cir. 1999); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 n.3 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993)(citing *Meadows v. State of Ind.* 854 F.2d 1068, 1069 (7th Cir. 1988)); *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1493 (10th Cir. 1983); *Hefrich v. Pennsylvania Dept. of Military Affairs*, 660 F.2d 88, 90 (3rd Cir. 1981); *Henry v. Textron, Inc.*, 577 F.2d 1163, 1164 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978).

The Fifth Circuit's opinion is further is in conflict with *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331, 1333 (Fed. Cir. 2001), in which the Federal Circuit found the Merit Systems Protection Board lacked authority to issue orders to the Ohio Adjutant General, even though the statute at issue - 5 U.S.C. § 1204(a)(2) - is even narrower in scope of enforcement power than 5 U.S.C. § 7118(a)(7) of the Labor Management Act. Here, the Fifth Circuit ignored the plain language of the Labor Management Act statutes at issue, and, employing common law agency rules, found the FLRA to have the authority to issue compulsory orders against a state Adjutant General, a result contrary to *Singleton*. 12a, 18a.

Additionally, the Fifth Circuit's finding that the Adjutant General can act in a federal capacity though in a state

command status, 13a, is contrary to Sixth and Ninth Circuit decisions. For example, in *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999) (quoting B. Rich, *The National Guard and Posse Comitatus*" 1994 Army Law 16, 19) the Sixth Circuit held that "'[t]he issue of status depends on command and control and not on whether: state or federal benefits apply; state or federal funds are being used; the authority for the duty lies in state or federal law; or any combination thereof.'" Further, in *United States v. Hutchings*, 127 F.3d 1255, 1258-59 (10th Cir. 1997) (emphasis added), the Tenth Circuit found that in the context of the Guard, whether one is in a state or federal status "[d]epends ***solely*** on whether command of the Guardsman has been taken away from a state's governor by one authorized to do so by Congress." These Circuit splits additionally counsel for the grant of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Aug. 22, 2003]

No. 02-60060

JAMES H. LIPSCOMB, III, Major General, in his official capacity as the Adjutant General of the State of Mississippi, of the Militia, of the Mississippi National Guard, and as the Executive Head of the Mississippi Military Department; MISSISSIPPI MILITIA; MISSISSIPPI NATIONAL GUARD; MISSISSIPPI MILITARY DEPARTMENT,

Plaintiffs-Appellants,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region; LINDA J. NORWOOD, in her former official capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region;

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 6/24/03, 5th Cir., ____, ____ F.3d ____)

Before JOLLY, DUHÉ, and WIENER, *Circuit Judges*.

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
E. GRADY JOLLY
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-60060.

JAMES H. LIPSCOMB, III, Major General, in his official capacity as the Adjutant General of the State of Mississippi, of the Militia, of the Mississippi National Guard, and as the Executive Head of the Mississippi Military Department; Mississippi Militia; Mississippi National Guard; Mississippi Military Department,

Plaintiffs-Appellants,

v.

FEDERAL LABOR RELATIONS AUTHORITY, Nancy Speight, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region; Linda J. Norwood, in her former official capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region,

Defendants-Appellees.

June 24, 2003

Appeal from the United States District Court
for the Southern District of Mississippi

Before JOLLY, DUHÉ, and WIENER, *Circuit Judges*.

E. GRADY JOLLY, *Circuit Judge*:

This appeal involves the efforts of the Association of Civilian Technicians ("ACT"), a labor union, to conduct a representation election among the Mississippi Army National

Guard civilian technicians. Adjutant General Lipscomb in his official capacity as head of the Mississippi National Guard ("MSNG"), the Mississippi Militia, and the Mississippi Military Department (along with the entities themselves) (collectively, "Lipscomb"), brought this action for a declaratory judgment that the Federal Labor Relations Authority ("FLRA") had no authority under the Federal Service Labor-Management Relations Act ("FSLMRA") to order the Mississippi Army National Guard ("MSANG"), a unit of MSNG, to permit a union election among its technicians. The district court dismissed the complaint, finding that the MSANG, as a subpart of the MSNG, and a federally recognized unit of the Army National Guard of the United States, is an activity of a federal agency; and that the Adjutant General ("AG"), as the duly authorized representative of the United States military service secretaries, is itself a federal agency. Thus, the district court concluded, the MSNG, MSANG, and AG are properly subject to the jurisdiction of the FLRA.

We hold that the civilian technicians, clearly federal employees by virtue of the National Guard Technicians Act, Pub.L. No. 90-486, 82 Stat. 775 (codified as amended at 32 U.S.C. § 709 (2003)), are included under the terms of the FSLMRA as federal employees of an Executive agency. We further find that the AG--as an employer of these federal employees--along with the MSNG and MSANG, which organizations operate under the AG's authority and direction, are federal executive agencies for the purpose of the FSLMRA, and consequently are subject to the jurisdiction of the FLRA. Accordingly, we agree with the district court and AFFIRM its judgment dismissing the complaint.

I

In April 2000, the ACT petitioned the FLRA to order an election among the MSANG technicians. After an evidentiary hearing on the proposed bargaining unit and associated

issues, the FLRA's office in Atlanta granted ACT's petition in February 2001 and ordered an election. On review to the FLRA in Washington, DC, this decision was upheld in June. When FLRA officials ordered an election, Lipscomb filed the present action, seeking declaratory and injunctive relief. Lipscomb alleged that the defendants were acting in excess of their statutory powers and in violation of plaintiffs' constitutional rights. The district court found it had jurisdiction over the action for declaratory judgment, and granted summary judgment in favor of the FLRA, holding that the FLRA had authority to order an election.

In reaching its conclusion, the district court, in a thorough and cogent opinion, found that MSNG is a federal agency; that MSANG is an activity of a federal agency; that because the AG wears a federal hat for purposes of applying the FSLMRA, the constitutional claims under the Tenth and Eleventh Amendments lacked merit; and finally, that because of the civilian nature of the technicians' employment, the doctrine of *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) (military aspects of civilian employment are not subject to negotiation) did not apply.

On appeal, Lipscomb argues that the application of the FSLMRA to the MSANG and MSNG conflicts with the statutory scheme under which the Guard operates, with precedents of the Supreme Court and this Circuit, with the Tenth and Eleventh Amendments to the United States Constitution, and with the *Feres* doctrine. More specifically, Lipscomb contends that neither the MSNG, the MSANG, nor the AG are federal executive "agencies" or "activities" of those agencies within the meaning of 5 U.S.C. § 7103(a)(3) and related regulations, and therefore that the FLRA lacks jurisdiction over them.

II

We begin our consideration of this appeal with full recognition that the national guard is the militia, in modern-

day form, that is reserved to the states by Art. I § 8, cls. 15, 16 of the Constitution. *Maryland v. United States*, 381 U.S. 41, 46, 85 S.Ct. 1293, 14 L.Ed.2d 205 (1965). However, in the modern-day federal scheme, the national guard has come to occupy a unique place. It has become, by design, a "hybrid" entity that carefully combines both federal and state characteristics, sometimes distinctly and sometimes not. The second Militia clause of the federal Constitution illustrates this duality, reserving "to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Const. art. I, § 8, cl. 16. The daily operations of the national guard units are thus recognized generally to be under the control of the states, but governed largely by substantive federal law. Under the National Defense Act, 39 Stat. 166, passed in 1916, the guard has been trained in accordance with federal standards and is armed and funded by the United States government. The Army National Guard of the United States is a component of the Army, and is made up of the federally recognized units and organizations of the Army National Guards in the respective fifty states. 10 U.S.C. §§ 3062, 10105. This dual federal- state nature of the national guard system has remained essentially unchallenged, as the Supreme Court has observed. *Perpich v. Department of Defense*, 496 U.S. 334, 347, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990).

In addition to its part-time, purely military personnel, the national guard employs full-time civilian workers, described as national guard technicians. These civilian technicians—the object of the union's organizing efforts here—are employed by and perform the daily operations of the state guard units, but are funded by the federal government. Despite their state character, these employees were explicitly granted federal employee status in 1968 when Congress enacted the Technicians Act. "In 1968, Congress was reacting to a situation in which national guard technicians were considered state

employees and consequently were not assured of uniform treatment with respect to fringe benefits or retirement plans." *New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283-84 (3d Cir.1982) ("*New Jersey Guard*"). To provide uniformity and afford national guard technicians the emoluments of federal service, "all Guard technicians, who had previously been employees of the states, were declared to be federal employees, and were thereby afforded the benefits and rights generally provided for federal employees in the civil service." *Id.* at 279. Thus, through an act of Congress, national guard technicians are by design "dual-status" employees. *See Brown v. United States*, 227 F.3d 295, 298 (5th Cir.2000); *Davis v. Vandiver*, 494 F.2d 830, 832 (5th Cir.1974) ("The principal purpose of the National Guard Technicians Act . . . was to create a bifurcated nature of technician employment . . . .").

In granting technicians federal employee status under the Technicians Act, Congress was nonetheless concerned with protecting the military authority of the states. Accordingly, "federal employee status was carefully hinged upon the reservations set out in section 709[(f)] of certain powers to the state adjutants general." *New Jersey Guard*, 677 F.2d at 284. "[S]ection 709 [(f)], which ensures the authority of the state adjutants general, can be viewed as a virtual quid pro quo for the section 709[(e)] grant of federal employee status." *Id.* Numerous courts, after reviewing the legislative history of the Technicians Act, have held that the matters explicitly reserved to the discretion of the adjutants general by section 709(f) reflect Congress's careful compromise, and thus are beyond the scope of bargaining under the FSLMRA.[1] *See, e.g., New York Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d 502, 505 (2d Cir.1985); *Indiana Air National*

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[1] The current section 709(f) was previously 709(e) and is referred to as such in cases prior to the 1999 Amendments, Pub.L. 106-65, § 524, which rewrote parts of § 709. This opinion will refer to the current statute.

Guard v. FLRA, 712 F.2d 1187, 1190, n. 3 (7th Cir.1983); *State of Nebraska Military Department, Office of the Adjutant General v. FLRA*, 705 F.2d 945 (8th Cir.1983); *California National Guard v. FLRA*, 697 F.2d 874 (9th Cir.1983). These decisions recognized and safeguarded the careful state-federal power balance struck by Congress in enacting the Technicians Act; "it was necessary to carefully craft the legislation so as not to compromise the essential military requirements of state guard service." *American Federation of Government Employees, AFL-CIO, Local 2953 v. FLRA*, 730 F.2d 1534, 1543 (D.C.Cir.1984). Section 709(f) reflects that deliberate calibration, and the courts, interpreting portions of the Technicians Act as exceptions to the FSLMRA's broad coverage, have found it to be a substantial check on the scope of the FLRA's authority.[2] We now turn to examine more closely the act under which the FLRA attempts to assert jurisdiction over the MSANG.

III

The Civil Service Reform Act of 1978 brought about a new era of labor- management relations for the federal service. Pub.L. No. 95-454, 92 Stat. 111, 5 U.S.C § 7101, *et seq.* Title VII of the Reform Act, the FSLMRA, governs the labor relations of most federal employees with the federal government. The FSLMRA "grants federal agency employees the right to organize, provides for collective bargaining, and defines various unfair labor practices. §§ 7114(a)(1), 7116. It creates the FLRA, which is responsible for

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[2] It is worth noting that the FLRA itself protects this balance, rejecting unions' efforts to encroach on the discretion of the adjutants general by seeking to force bargaining over certain, excepted terms and conditions of technicians' employment. *See, e.g., American Federation of Government Employees, AFL-CIO, Local 2953 v. FLRA*, 730 F.2d 1534, 1541 (D.C. Cir.1984) (affirming FLRA's decision upholding the national guard's refusal to bargain over matters that would conflict with the mandate of the Technicians Act).

administering the statute through the exercise of broad adjudicatory, policymaking and rulemaking powers. §§ 7104, 7105." *Nat'l Federation of Federal Employees, Local 1309 v. Dept. of Interior*, 526 U.S. 86, 88, 119 S.Ct. 1003, 143 L.Ed.2d 171 (1999). The Act applies to employees of an "Executive agency," § 7103(a)(2)-(3), and states that "each employee shall have the right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." § 7102. Notably, the Act specifically exempts certain Executive agencies from coverage, including the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, and the Federal Labor Relations Authority, among others. *See* § 7103(a)(3)(A)-(H). Although members of the uniformed services are explicitly exempted, § 7103(a)(2)(B)(ii), the national guard as such is not mentioned, nor are the civilian technicians employed thereby. Thus, we turn to address the next question (and now we begin to get into a thicket), whether the civilian technicians of the MSANG are "employees of an Executive agency" of the federal government within the meaning of the FSLMRA.

IV

Under the Technicians Act, a civilian technician in a state national guard is statutorily "an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. § 709(e). It is thus indisputable that the technicians of the MSANG are "employees of an Executive agency" under the coverage terms of the FSLMRA. They therefore have the right to choose union representation, as indeed numerous cases have acknowledged. *See, e.g., Association of Civilian Technicians, Schenectady Chap. v. FLRA*, 230 F.3d 377, 378 (D.C.Cir.2000) (observing that, as federal employees, the

guard's civilian technicians are entitled to engage in collective bargaining over certain matters); *New York Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2d Cir.1985) (noting that federal employees' labor relations are governed by the Civil Service Reform Act, and applying the Act to national guard technicians); *New Jersey Guard*, 677 F.2d at 284 (noting the FSLMRA exempts certain executive agency employees from coverage, but because it does not reference the national guard or its technicians, it applies to them).

Nevertheless, Adjutant General Lipscomb maintains that the MSANG, the MSNG, and the AG are not subject to the jurisdiction of the FLRA because, while the technicians are federal employees for certain purposes, these entities that directly employ and supervise them are not federal "Executive agencies" under § 7103(a)(3), nor does their employment of the technicians constitute "federal activities" of an agency under 5 C.F.R. 2421.4.[3] Consequently, to the extent that these technicians may be considered federal employees of the appellants, Adjutant General Lipscomb argues, they are not "employees of a federal Executive agency" within the meaning of the FSLMRA and are not subject to its coverage. The question is thus reduced to whether these state national guard entities are "federal executive agencies" for purposes of the FSLMRA, because if they are, they are plainly covered within its terms. Although many courts have had occasion to review various aspects of the Technicians Act and its interaction with the FSLMRA, it appears that no court of appeals has addressed the

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[3] 5 C.F.R. § 2421.4 defines "Activity" as it is used in the regulations implementing the FSLMRA. *See* 5 C.F.R. 2420.1 (purpose of subchapter is to implement Chapter 71 of Title 5, governing Labor- Management Relations). Section 2421.4 states that "Activity means any facility, organizational entity or geographical subdivision or any combination thereof, of any agency."

jurisdictional questions from the perspective raised by Lipscomb in this case. All of the decisions analyzing FLRA orders and actions taken with respect to the various state national guard organizations apparently have accepted without question the jurisdiction of the FLRA over them and their related entities, but only by virtue of the federal status of the employees, not the status of their employer.[4]

We should make reference to another factor (which we have earlier noted) that burdens appellants' argument that none of them is an "Executive agency." By the express terms of the Technicians Act, the civilian technicians of the MSANG—bifurcated though the nature of their employment may be—are declared to be federal employees of an Executive agency, *i.e.*, the Department of the Army. 32 U.S.C. § 709(e). As such, it would seem that they are, by definition, statutorily entitled to the union organizational rights created for federal employees by the FSLMRA. *See Association of Civilian Technicians*, 230 F.3d at 378. Yet, given how the issue is framed in this case, we must consider whether the Adjutant General, as the designated employer of these particular federal employees, and the entities he oversees, are federal agencies for the purpose of the FSLMRA, and are thus subject to the jurisdiction of the FLRA.[5]

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[4] Even the MSNG, now contesting the FLRA's authority over it, has appeared previously before the FLRA to contest the appropriateness of a proposed bargaining unit, apparently without raising the jurisdictional objection now presented. *Mississippi National Guard Mates Shop, Camp Shelby and Association of Civilian Technicians, Inc.*, 12 F.L.R.A. 618 (1983).

[5] Certainly, nothing in this opinion expands the scope of the Mississippi National Guard's duty to bargain; we are not called upon to examine any of the areas reserved by § 709(f) to the sole discretion of the adjutants general of the states. We proceed with the utmost caution, fully cognizant of the unique role and duty the national guard plays in the defense of this nation, as well as the special role the states have in

A.

The Adjutant General

We first examine the status of the Adjutant General in determining whether the FLRA properly asserts jurisdiction over the MSANG and MSNG. The appellants admit, as they must, that the AG is an employer, indeed the ultimate employer, of these federal employees as provided under an act of Congress, the Technicians Act. They also acknowledge that he is the officer with ultimate control over and responsibility for the MSNG and MSANG under state law. It follows from the undisputed federal status of the technicians that their employer and supervisor is, at the very least, an employer of federal employees. By any ordinary standard of reasoning, it would seem incontrovertible, in the absence of a contrary statutory definition,[6] that a statutory employer of

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administering the national guard and the Technicians Act; we do not purport to subject the national guard to any greater burden in its labor relations than that permissible under the existing law. We merely hold that the federal employees employed by the AG and MSANG are entitled to the rights afforded the rest of the non-excepted federal civilian employees, and recognized in countless court decisions affecting numerous national guard units and entities.

[6] 5 U.S.C. § 7103(a)(3) defines "agency" as "an Executive agency including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs, the Library of Congress, the Government Printing Office, and the Smithsonian Institution but does not include—

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority;

(G) the Federal Service Impasses Panel; or

regular and permanent federal employees, is a "federal employer;" and, consequently, that a federal employer of such federal employees of the Executive Department, with the authority to direct and supervise all of their day-to-day work, must constitute, at least in some recognizable, if limited sense, an "agency" of the Executive branch of the federal government.

Yet the AG argues that because of his purely state character as an officer appointed by the state, in charge only of the state militia under Article I, § 8 of the Constitution, with authority primarily drawn from state statutes—and with no federal statute expressly defining him as a "federal executive agency"—he is not, under the terms of the FSLMRA (defining coverage as employees of an "Executive agency"), subject to the jurisdiction of the FLRA. We must admit that if one is searching for translucent, definitional, statutory words under the FSLMRA stating that the entities composing the Mississippi National Guard constitute an "Executive agency", the search will be disappointing. But yet our consideration of the many factors to which we have alluded—most arising from the Technicians Act—leaves no doubt that the hybrid character of the AG includes a federal component, which in his capacity as employer of the technicians renders him an "Executive agency". As one court has observed, Section 709 "charges the adjutant generals with employment and administration of the civilian technicians who are federal employees. In view of the foregoing there can be no doubt that the Adjutant General of Delaware is an agency or an agent of the United States and therefore within the purview of § 1361 [providing action for mandamus in

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(H) the United States Secret Service and the United States Secret Service Uniformed Division."

We find that the broad and somewhat circular terms of the statutory definitions of agency and Executive agency are non-dispositive in resolving the specific question that this appeal presents.

district courts against federal officers or agencies]." *Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir.1974).

Indeed, in *NeSmith v. Fulton*, 615 F.2d 196, 198 (5th Cir.1980), this Court held that the AG is *itself* a federal agency, despite its status as a state office, because of the federal nature of the employees the AG supervises and the substantive federal law that governs the AG's duties. "The conclusion that an adjutant general is a federal agency as well as a state officer reflects the hybrid state-federal character of the National Guard and the role of adjutants general in administering it." *Id.* at 199. Although this holding was applied to resolve a procedural issue, the court's conclusion in *NeSmith*—that the AG is itself a federal agency—constitutes precedent that, even without other considerations to which we have alluded, will control the outcome of this case. *See also Chaudoin*, 494 F.2d at 1329; *Gilliam v. Miller*, 973 F.2d 760, 762 (9th Cir.1992) (Oregon AG's personnel actions taken as supervisor of the federal civilian technicians were taken in the capacity of a federal agency, for purposes of determining whether the federal Administrative Procedures Act applies). In short, the AG constitutes an "Executive agency" for the purposes of this case.

Because of the federal character that the AG assumes under the Technicians Act, and because the FLRA asserts its jurisdiction over these entities only in their federal capacities, Appellants' remaining arguments, based on the Tenth and Eleventh Amendments to the federal Constitution and the state character of the AG, must fail.[7]

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[7] The AG relies on the Tenth and Eleventh Amendments to the Constitution to avoid the FLRA's assertion of jurisdiction over it. Appellants argue that the application of the FSLMRA to the AG amounts to conscription of a state official into the performance of a federal duty in violation of the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). The conclusion that the AG is a

B.

The Mississippi National Guard &
The Mississippi Army National Guard

The AG argues, however, that even if the AG is a federal agency, this appeal still is not resolved. He points out that the FLRA does not seek to assert its jurisdiction over the AG—that is to say, the AG is not a respondent to the underlying agency proceedings. Instead, only the MSNG and MSANG—the entities to which the technicians are assigned—are named as the employer parties in the proceedings before the FLRA. In this connection, the district court held that MSNG is a federal executive agency for purposes of the FSLMRA, 5 U.S.C. § 7103(a)(3), and that MSANG is an "activity" of a federal agency under 5 C.F.R. § 2421.4 ("Activity means any facility, organizational entity, or geographical subdivision or any combination thereof, of any agency."), and thus they are subject to the obligations of the FSLMRA. The district court concluded that MSANG is an "activity" of the Department of the Army, because it is recognized as a part of the Army National Guard of the United States.[8] Lipscomb argues that neither the MSNG or

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federal agency, subject to the FSLMRA in its federal capacity, renders *Printz* inapposite.

MSNG's second constitutional argument relies on the Eleventh Amendment and *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002) (state sovereign immunity precluded a federal agency from adjudicating a private party's complaint that the state port had violated the Shipping Act). For the purposes of the rights asserted in this case, the MSNG is a federal agency, unlike the state port in *South Carolina*.

[8] The district court's analysis reasoned as follows:

> [T]he statute defines "agency" to mean an "Executive agency," 5 U.S.C. § 7103(a)(3), which is in turn defined as "an Executive department . . . ." 5 U.S.C. § 105. The Department of Defense is an "executive department," *see* 5 U.S.C. § 101, and 10 U.S.C. § 111(a); and the Department of the Army is a component of the Department

the MSANG are agencies, and that the MSANG, by whom the instant technicians are employed, is not an "activity" of a federal agency.[9]

At the outset, we must say that once we have determined that the AG is a federal executive agency, it requires little exercise in reasoning for us to conclude that the MSANG and MSNG are executive agencies for the purpose of FLRA authority and this legal proceeding. This is true because they exist and operate under the authoritative direction and control of the adjutant general—indeed they are merely the adjuncts of his office, under whom, and on whose behalf, civilian technicians work.

The AG is the executive head of the Mississippi military department, Miss.Code. § 33-3-3, and he "shall provide for

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of Defense, *see* 10 U.S.C. § 111(b)(6). The Department of the Army consists of the Regular Army, the Army National Guard of the United States, the Army National Guard while in service of the United States and the Army Reserve, *see* 10 U.S.C. § 3062(b)-(d); and the Army National Guard of the United States is the reserve component of the Army that consists in relevant part of the "federally recognized units and organizations of the Army National Guard," *see* 10 U.S.C. § 10105. As it is indisputable "a federally recognized unit[ ] and organization of the Army National Guard," the Mississippi Army National Guard (which is a subset of the MSNG), is thus an element of the Army National Guard of the United States, and hence falls within the definition of "activity" of an "agency" within the meaning of § 7103(a)(3) of the FLSRA, which extends to federal agencies and to "activities" of federal agencies. *See* 5 C.F.R. § 2421.4.

Lipscomb v. Federal Labor Reations Authority, 200 F.Supp.2d 650, 660 (S.D.Miss.2001).

[9] As we note below, the question whether the FLRA can compel the Mississippi National Guard's compliance with the FLRA may be adequately resolved by the nature of AG Lipscomb himself—a federal employer and agency for purposes of the FSLRA. However, because the parties ascribe great importance to the nature of the MSANG, we address this issue.

and be responsible for the organization, training, tactical employment, and discipline of the Mississippi National Guard . . . ." Miss.Code. § 33-3-11. This includes the supervision and authorization of the Assistant Adjutants General for Army and Air. *See e.g.,* Miss.Code. § 33-3-9 (Assistant Adjutant General for Army "shall aid the Adjutant General by the performance of such duties as may be assigned to him"). It follows that, to the extent that the AG acts as an executive agency of the federal government, when the AG acts through the MSNG and MSANG in carrying out his federal duties—as he does here as the employer of the technicians--they likewise are departments of the federal agency of the AG—or if one chooses to use the words of the federal regulations, *supra,* these organizations are "activities" of a federal agency. Certainly, the appellants have offered no basis for us to reject this rationale, plainly dictated by a common sense reading of the applicable state statutes when considered in the light of our holding that the AG constitutes a federal executive agency.[10]

V

In sum, the appellants have provided us with no persuasive reason to reject decades of settled practice and the decisions of our sister circuits, which have upheld the organizational rights of national guard civilian technicians under the FSLMRA. Although neither we nor other appellate courts have previously addressed the precise arguments presented in this appeal, the resolution of the ultimate jurisdictional

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[10] Lipscomb cites *Clark v. United States*, 322 F.3d 1358 (Fed.Cir.2003) to support his argument that because the MSANG is an organizational entity of the state, distinct from the National Guard of the United States, it cannot be deemed a federal "Executive agency." *Clark* addressed the status of guardsmen--not dual-status technicians—under a wholly different statutory scheme. Consequently, *Clark* does not affect this Court's conclusions with respect to the federal character of AG Lipscomb or the entities he controls.

question presented is straightforward: Federal employees of federal executive agencies, with the noted statutory exceptions, are entitled to exercise the rights provided in the FSLMRA. The civilian technicians are non-excluded federal employees under the Act, and the AG employs those civilian technicians; as the federal employer of these federal employees, with full authority over such federal employees, the AG is—notwithstanding his dual capacity as a military officer of the State of Mississippi—an agency of the executive department of the federal government in the context of these proceedings, as are his organizational adjuncts in the exercise of that employer-related authority over federal employees.

Thus, for the reasons set out above, the appellants have failed to demonstrate that the district court erred in denying to them a declaratory judgment that the FLRA has no authority over the MSANG to order an election among the technicians in its service.[11] Accordingly, the judgment of the district court dismissing the complaint for declaratory relief is

AFFIRMED.

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[11] Appellants' argument that this action is barred by *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), is inapposite. In *Feres*, the Supreme Court held that military officers were not liable for injuries arising out of active duty in the armed forces. This action involves efforts by a federal agency to vindicate civilian employees' union rights, not by an individual seeking to impose liability on an officer of the military for duties arising from the unique relations between soldiers and their superiors. The *Feres* doctrine does not reach this case. *See Chappell v. Wallace*, 462 U.S. 296, 299, 305, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[Filed Jan 08, 2002]

CIVIL ACTION NO. 4:01cv158LN

MAJOR GENERAL JAMES H. LIPSCOMB III, in his Official Capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as Executive Head of the Mississippi Military Department, and the Mississippi Militia, the Mississippi National Guard, and the Mississippi Military Department

Plaintiffs,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, in her Official Capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region and Linda J. Norwood, in her Former Official Capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region

Defendants.

FINAL JUDGMENT

CAME BEFORE THE COURT FOR HEARING the motion of Plaintiffs:

(1) Major General James H. Lipscomb III, in His Official Capacities as the Adjutant General of the State of Mississippi; (2) of the Mississippi Militia; (3) of the Mississippi National

Guard; (4) and as Executive Head of the Mississippi Military Department; and (5) the Mississippi Militia; (6) the Mississippi National Guard; and

(7) the Mississippi Military Department, for a preliminary injunction and/or for summary judgment, as well as the motion of the Defendants to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. As the Parties presented to the Court matters outside the pleadings, and these matters were not excluded by the Court, the Court has, pursuant to Fed. R. Civ. P. 12(b), treated Defendants' motion to dismiss for failure to state a claim upon which relief can be granted, as one for summary judgment under Fed. R. Civ. P. 56. This Court has considered the written and evidentiary submissions of the Parties, as well as the oral argument presented at the hearing held on November 20, 2001.

This Court FINDS that it has subject matter jurisdiction over this Action and Plaintiffs' claims. This Court further FINDS, however, that Plaintiffs' Complaint and all claims therein are due to be dismissed with prejudice, because Plaintiffs' claims for relief are without merit as a matter of law. This Court incorporates herein by reference its Memorandum Opinion and Order dated December 19, 2001.

WHEREFORE, PREMISES CONSIDERED, it is hereby ORDERED and ADJUDGED that:

(1) Defendants' motion to dismiss for lack of subject matter jurisdiction is DENIED;

(2) Plaintiffs' motion for a preliminary injunction and/or summary judgment is DENIED;

(3) Defendants' motion to dismiss for failure to state a claim upon which relief can be granted (treated as one for summary judgment) is GRANTED;

(4) this Action is hereby DISMISSED with prejudice;

(5) Plaintiffs' August 7, 2001 Motion to Exceed Page Limitation With Respect to Their Memorandum of Authorities in Support of their Motion for Preliminary Injunction and/or for Summary Judgment and Plaintiffs' September 7, 2001 Miss. Unif. Dist. Ct. R. 7.2 Motion for Leave to Submit Rebuttal in Support of Their Motion for Preliminary Injunction and/or for Summary Judgment are both DENIED as MOOT; and

(6) each Party shall bear his, her or its own attorneys' fees, costs and expenses.

SO ORDERED and ADJUDGED, this the 8th day of January, 2002.

/s/ Tom S. Lee
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI
JACKSON DIVISION

No. Civ.A. 401CV158LN

MAJOR GENERAL LIPSCOMB III, in his Official Capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as the Executive Head of the Mississippi Military Department, and the Mississippi Militia, the Mississippi National Guard, and the Mississippi Military Department,

Plaintiffs,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, in her Official Capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region, and Linda J. Norwood, in her Former Official Capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region,

Defendants.

Dec. 19, 2001

MEMORANDUM OPINION AND ORDER

TOM S. LEE, District Judge.

There are pending at this time a motion by the plaintiffs for preliminary injunction and for summary judgment, and a motion by defendants to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can

be granted. Each has responded to the others' motion of the other, and having now considered the parties' memoranda of authorities with accompanying evidentiary submissions, and having considered the parties' arguments at the hearing on the motions, the court concludes that it does have jurisdiction over plaintiffs' claims, but that plaintiffs' complaint is due to be dismissed since, in the court's opinion, plaintiffs' claims for relief are without merit as a matter of law.

This action was filed by Major General James H. Lipscomb, III, Adjutant General of the State of Mississippi, in his official capacities As head of the Mississippi Militia and the Mississippi National Guard, and as Executive Head of the Mississippi Military Department, and by the Mississippi Militia, the Mississippi National Guard and the Mississippi Military Department against the Federal Labor Relations Authority (Authority), and the current and former regional directors of the Authority, Nancy Speight and Linda Norwood, respectively (to all of whom the court will refer collectively as the Authority), challenging as unconstitutional and on other grounds the Authority's order directing that an election be held to determine whether "[a]ll wage grade and general schedule employees employed by the Mississippi Army National Guard statewide" wish to be represented for purposes of collective bargaining by the Association of Civilian Technicians as their exclusive representative.

The Authority is a federal agency charged with the responsibility of administering the Federal Service Labor Relations Act (FSLRA), 5 U.S.C. § 7101 *et seq.*, the exclusive statutory scheme governing labor relations between federal agencies (other than those expressly excepted from the FSLRA) and their employees. In enacting the FSLRA, Congress found that "labor organizations and collective bargaining in the [federal] civil service are in the public

interest," 5 U.S.C. § 7101(a),[1] and thus, as in private industry, the Act recognizes and protects the rights of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity," *id.* § 7102, and causes certain actions by "executive agencies" (or labor organizations) to be deemed unfair labor practices, *id.* § 7116, against which the Authority may take appropriate administrative or judicial action, § 7123(b). *See American Federation of Gov't Employees, Local 3936, AFL-CIO v. Federal Labor Relations Auth.*, 239 F.3d 66, 70 (1st Cir.2001). As set forth in § 7105 of the Act, the Authority is charged with providing leadership in establishing policies and guidance relating to federal service labor-management relations and carrying out the purpose of the Act. Generally speaking, its duty is to ensure compliance with the statutory rights and obligations of federal employees, labor organizations and federal agencies. Among other things, the Authority is specifically charged with the responsibility of "(A) dertermin[ing] the appropriateness of units for labor organization representation under section 7112 of this title;[2]

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[1] The Act recites: Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
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> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7102.

[2] Section 7112 states, in part, that:

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure

(B) supervis[ing] or conduct[ing] elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer[ing] the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;[3] . . . and

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employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

[3] Section 7111 states, in pertinent part, as follows:

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

(b) If a petition is filed with the Authority—

(1) by any person alleging—

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation; the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an

(I) tak[ing] such other actions as are necessary and appropriate to effectively administer the provisions of this chapter."

In April 2000, the Association of Civilian Technicians, a private union, filed a petition with the Authority seeking an election to determine if it should be the exclusive representative of "all wage grade and general schedule [technician] employees employed by the Mississippi Army National Guard statewide." Pursuant to 5 C.F.R. § 2422.17, the Mississippi National Guard (MSNG) made a request to the Authority for a hearing on the appropriateness of the proposed bargaining unit and "associated issues." The request was granted, and an evidentiary hearing was held in December 2000, following which defendant Norwood, the Authority's then-acting regional director, issued her decision and order on February 28, 2001, rejecting the MSNG's opposition and granting the union's petition for an election. MSNG sought review by the Authority pursuant to 5 C.F.R. § 2422.31, asserting constitutional and statutory challenges to the actions of the Authority and Norwood; Norwood's decision was upheld by a decision of the Authority, Washington, D.C. issued June 29, 2001. Thereafter, and upon being informed by an Authority official that the regional director intended to order a union election if the parties did not first agree to an election voluntarily, plaintiffs filed this lawsuit seeking declaratory and injunctive relief. Specifically, plaintiffs seek a declaratory judgment that (1) the Authority lacks subject matter jurisdiction over the underlying administrative proceeding because the Mississippi Army National Guard is not a federal agency within the meaning of the FSLRA; (2) the Authority's order of an election unconstitutionally compels a state agency to perform a federal function in violation of the Tenth Amendment and *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138

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election on the question by secret ballot and shall certify the results thereof. . . .

L.Ed.2d 914 (1997), and in violation of the plaintiffs' Eleventh Amendment immunity; and (3) the employees here involved cannot be represented by a union because they are military personnel in a military organization and union representation would run afoul of the *Feres* doctrine. By their motion for preliminary injunction, plaintiffs seek to enjoin the Authority from carrying out its election.[4]

DEFENDANTS' MOTION TO DISMISS

In response to plaintiffs' complaint, the Authority has moved to dismiss, taking the position that this court is without subject matter jurisdiction because Congress, by providing in the FSLRA an exclusive appeals process for those seeking review of an "appropriate unit determination" by the Authority, has foreclosed all other avenues of review of such determinations. It further submits that the case is not yet ripe for judicial review since there has as yet been no representation election and since the results of any such election may favor plaintiffs, with the result that they have to

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[4] Specifically, plaintiffs have prayed for issuance of a preliminary injunction "maintaining the status quo pending the outcome of this action and prospectively prohibiting defendants from:

(1) enforcing the FSLRA against the Militia Plaintiffs;

(2) conscripting and dragooning the Militia Plaintiffs to enforce or administer the FLSRA and the Defendants' orders;

(3) forcing the Militia Plaintiffs to engage in collective bargaining with or to recognize any union;

(4) taking any enforcement action against the Militia Plaintiffs based on the matters at issue in this Action; and

(5) taking any action to hold a union election or otherwise process such a request with respect to the Militia Plaintiffs; or

In the Alternative

(1) requiring the Militia Plaintiffs to recognize any union containing, or to bargain with, any actual or prospective bargaining unit containing Military Technicians.

date suffered no cognizable harm and may never suffer harm. Defendant contends further that even if the court has jurisdiction, it still must dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) for failure to state a claim on which relief may be granted. As a matter of procedure, since defendant's motion calls into question the court's jurisdiction, it must be addressed first.

The Authority takes the position that in accordance with 5 U.S.C. § 7123, plaintiffs are expressly foreclosed from pursuing any direct challenge in this court to its decision pursuant to 5 U.S.C. § 7112 that the Mississippi Army National Guard's technicians constitute an "appropriate unit."[5] Section 7123 provides that

> (a) Any person aggrieved by any final order of the Authority other than an order under—
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> * * *
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> (2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

Defendant maintains that the plain language of this statute bars direct judicial review of Authority decisions involving appropriate unit determinations, such as it claims is the subject of this case, and that it operates to render inapplicable general jurisdictional grants which might otherwise provide original jurisdiction in the federal district courts.

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[5] *See supra* note 2.

As is clear from the plain terms of the statute, Authority "appropriate unit determinations" are normally reviewable only where the dispute concerning the correctness of the Authority's determination "eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit." *Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 84 S.Ct. 894, 896-97, 11 L.Ed.2d 849 (1964). Although this is the normal procedure for review, the courts have recognized "[t]hree 'extraordinary circumstances' requiring pre-election judicial review of a Board representation order. . . ." *Florida Board of Business Regulation, Dept. of Business Regulation, Div. of Pari-Mutual Wagering v. National Labor Relations Board*, 686 F.2d 1362 (11th Cir.1982) (citing *Bishop v. NLRB*, 502 F.2d 1024, 1027 (5th Cir.1974)).

The first is when a case presents a "public question( ) particularly high on the scale of our national interest because of (its) international complexion." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17, 83 S.Ct. 671, 675, 9 L.Ed.2d 547 (1963). The second is when the plaintiff makes a clear and strong showing that the Board has violated his constitutional rights. *Squillacote v. Int'l Bhd. of Teamsters, Local 344*, 561 F.2d 31, 38 (7th Cir.1977); *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C.Cir.1968), *cert. denied*, 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560 (1969); *Greensboro Hosiery Mills, Inc. v. Johnston*, 377 F.2d 28, 32 (4th Cir.1967). *Cf. Fay v. Douds*, 172 F.2d 720 (2d Cir.1949) (alleged constitutional violation that is not transparently frivolous sufficient to invoke district court's subject matter jurisdiction to review representation order). The third is when the plaintiff asserts that the Board clearly acted "in excess of its delegated powers

and contrary to a specific prohibition in the Act." *Leedom v. Kyne*, 358 U.S. at 188, 79 S.Ct. at 184.

Florida Board, 686 F.2d at 1369.[6] Defendant contends that none of these exceptions to the usual rule of no pre-election

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[6] The court in *Florida Board* explained the reason for the "extraordinary circumstances" rule, as follows:

> The extraordinary circumstances rule was fashioned to deal with time consuming pre-election challenges to Board orders which unduly delayed the choice of employee representations. When Congress passed the Act in 1935, it was particularly concerned that Board-ordered representations elections be held posthaste.
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> When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts.
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> *Boire v. Greyhound Corp.*, 376 U.S. at 478, 84 S.Ct. at 897, *quoting* H.R.Rep. No 972 74th Cong., 1st Sess. at 5 (1935). Congress therefore provided that employers and labor unions could not seek direct review of Board election orders in the Court of Appeals until the election had been held and the Board had certified the result and entered a bargaining order.
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> *Id.* at 1369 (additional citations omitted). The court noted that Congress intended that Board representation election orders be reviewed by the Court of Appeals after the election and after the employer refused to bargain with the union. The employer's initial challenge to the Board representation election order would be made before the Board, when the employer responded to the union's unfair labor practice charge. If the Board affirmed its earlier election order and concluded that the employer was guilty of an unfair labor practice, the employer could then seek review of the Board's decision, including its election order, in the Court of Appeals. *See* § § 9(d) and 10(f) of the Act, 29 U.S.C. § § 159(d) and 160(f). *See also Boire v. Greyhound Corp.*, 376 U.S. at 477, 84 S.Ct. at 896-97.
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> *Id.* at 1369 n. 13. The court went on to explain, Congress did not

review applies, and that this court must therefore dismiss plaintiffs' complaint for want of jurisdiction. The court concludes otherwise.

In *Florida Board*, 686 F.2d 1362 (11th Cir.1982), the court rejected an argument similar to that advanced by the Authority in the context of a challenge to a NLRB order directing a representation election,[7] stating that "a plaintiff who cannot seek review of the Board's order in the Court of Appeals but who claims that the Board violated his federal rights has the right to repair to the district court under any statute that may grant the district court the power to hear his claim." *Id.* at 1370 (citing *Leedom v. Kyne*, 358 U.S. 184, 190, 79 S.Ct. 180, 184, 3 L.Ed.2d 210 (1958)). In *Florida Board*, the State of Florida filed suit in federal district court to enjoin a representation election ordered by the NLRB and to obtain a declaratory judgment that the NLRB lacked authority over labor disputes involving jai alai players in Florida on the

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expressly bar employers and unions from seeking pre-election review in district court, however, and they frequently turned to the district court for relief. *Leedom v. Kyne* questioned the validity of this tactic, and the Supreme Court held that the district courts had subject matter jurisdiction to entertain these suits and to review the Board's representation orders. 358 U.S. at 188, 79 S.Ct. at 183-84. The Court later qualified this holding in *Boire v. Greyhound Corp.*, 376 U.S. at 478-79, 84 S.Ct. at 897-98, to prevent attempts by an employer or a rival union to use the district court merely as a weapon to delay a Board-ordered election. Only in extraordinary circumstances, the Court concluded where the need to hear the case immediately is manifest, is the district empowered to enjoin an election and to review an election order. *Id.* at 479-80, 84 S.Ct. at 898.

Id. at 1369.

[7] The Authority's role and function in administering the FSLRA are analogous to those of the National Labor Relations Board in the private sector under the NLRA. *American Federation of Gov't Employees, Local 3748 v. FLRA*, 797 F.2d 612, 613 (8th Cir.1986).

bases, *inter alia*, that the Board lacked jurisdiction under the National Labor Relations Act, (§ 14(c)(1)) and that the Tenth Amendment barred Board regulation of labor disputes in the state-regulated jai alai industry. *Id.* at 1366. Citing *Boire v. Greyhound Corp.*, 376 U.S. 473, 479, 84 S.Ct. 894, 898, 11 L.Ed.2d 849 (1964) and *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), the Board argued that although the district courts have subject matter jurisdiction to enjoin the execution of a representation election order in certain "extraordinary circumstances," such circumstances were not present and the court thus lacked subject matter jurisdiction. The court agreed that "[a]s to [the] prayer for [injunctive] relief the Board's position [was] correct, for the extraordinary circumstances rule of *Greyhound* and *Leedom* was clearly applicable." However, the court held that there was jurisdiction over the additional claim for declaratory relief, as to which the court stated:

> We are convicted that the rule of *Boire v. Greyhound Corp.* and *Leedom v. Kyne* is inapposite and that the district court had subject matter jurisdiction under § 1331 (1978 Supp.) to entertain the State's suits against the Board. . . . [T]he State's complaint asked for more than an injunction against a Board election order; it sought a declaration that the Board lacked statutory and constitutional authority to regulate labor disputes in the jai alai industry as a whole. As to this prayer for relief, the extraordinary circumstances rule has no application.

Florida Bd., 686 F.2d at 1368.[8] In keeping with *Florida Board*, which this court considers to provide the appropriate

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[8] Defendant undertakes to distinguish *Florida Board* on the basis that the plaintiff was the State of Florida, not the actual employer, and that the State of Florida, not being a party to the Board proceeding, would not have had standing or the ability to pursue remedies via the appeals process established by the statute. While that is certainly a distinction, so far as this court can tell, it is not a distinction that influenced the court's decision in *Florida Board*. Indeed, the fact that the State would have

analysis for the case at bar,[9] while this court may not have jurisdiction over plaintiffs' claim for injunctive relief, it does have jurisdiction over plaintiffs' claims for declaratory relief.[10]

In a related vein, defendant argues that plaintiffs' claims are not ripe for review, as a consequence of which this court lacks jurisdiction. In this regard, it submits that the Authority's determination here, i.e., that the bargaining unit proposed by the union is appropriate, does not complete the representation process now pending before the Authority, and that until such time as the Authority actually conducts the election to determine whether the employees in the unit wish to be represented by the union and ultimately determines whether to certify the results of the election, the

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lacked standing did not cause the court to consider its claim for injunctive relief, which it found was not within the court's jurisdiction; and as to the claim for declaratory relief, the court declared, without limitation, that the extraordinary circumstances rule had "no application" so that the claim was cognizable in the district court.

[9] The Authority maintains that *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-64, 82 L.Ed. 638 (1938), mandates a contrary result. The court is not persuaded. The *Florida Board* decision, rendered nearly 45 years after *Myers*, more directly addresses the issue here presented and thus is more pertinent to the court's inquiry.

[10] Plaintiffs contend this case falls within the *Leedom v. Kyne* "extraordinary circumstances" exception in any event; defendant maintains that this narrow exception is not implicated. *See Griffith v. FLRA*, 842 F.2d 487, 494-95 (D.C.Cir.1988) (stating with respect to *Leedom v. Kyne*, "We have said that review may be had only when the agency's error is 'patently a misconstruction of the Act,' or when the agency has 'disregarded a specific and unambiguous statutory directive,' or when the agency has 'violated some specific command' of a statute. Garden- variety errors of law or fact are not enough.") (citations omitted). While it is not clear that plaintiffs' position in this regard is patently without merit, as defendant contends, the court finds it unnecessary to decide whether the *Leedom* exception may properly be applied to this case.

administrative process is not complete. It further contends that the Mississippi Army National Guard would be required to actually enter into collective bargaining with the union only if the Authority certifies that the union has received a majority of the votes in an election and that otherwise, the Mississippi Army National Guard will have no bargaining obligation, so that plaintiffs have thus not yet suffered any injury in fact, and may never suffer any injury in the event the union fails to achieve a majority vote.

In the court's opinion, the plaintiffs' challenge to the Authority's jurisdiction in the face of an assertion of such jurisdiction constitutes a presently justiciable controversy. *Cf. Florida Bd. of Business Regulation v. N.L.R.B. (Florida Board I),* 605 F.2d 916, 918-19 (5th Cir.1979) ("[T]he question of the mootness of the State's claim under the Declaratory Judgment Act, 28 U.S.C. § § 2201-2202 (1976), becomes "'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment.'"'"). In the analogous context of a mootness issue in *Florida Board I*, the court concluded that a challenge to a representation election order was cognizable, despite the fact that the election had been conducted and the union had failed to achieve a majority vote. The court noted that in view of "the breadth of the Board's assertion of jurisdiction, there is certainly a reasonable expectation that the State's alleged interest in the jai alai industry will be threatened by such orders in the future." *Id.* at 920. Likewise, here, the plaintiffs' objection to the Authority's jurisdiction exists as a live controversy, regardless of the current state of the administrative proceedings. In fact, it is *the fact* that the plaintiffs are being put through the administrative proceedings which renders their claim justiciable. Accordingly, the court rejects defendant's challenge to this court's jurisdiction over the present controversy.

PLAINTIFFS' MOTION TO DISMISS/DEFENDANT'S SUMMARY JUDGMENT MOTION

Having resolved that it has jurisdiction to proceed, the court now turns to the parties' substantive positions. As indicated *supra*, plaintiffs seek a declaratory adjudication that the Authority may not validly order a representation election, in support of which they advance essentially four arguments. They contend, (1) that the Authority lacks jurisdiction over the underlying administrative proceeding because the Mississippi Army National Guard is not a federal agency within the meaning of the FSLRA, and because the Adjutant General, who actually is vested with sole authority with respect to matters of technicians' employment, is not a federal agency either, but rather is a state officer; (2) that in accordance with the Supreme Court's opinion in *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), it is manifest that the Authority's order violates the Tenth Amendment in that it impermissibly purports to compel a state agency to perform a federal function, and further is in derogation of the plaintiffs' immunity under the Eleventh Amendment; and finally (3) that the Authority's actions violate the *Feres* doctrine because technicians—or dual status technicians—are military personnel in a military organization with whom the military defendants cannot be compelled to engage in collective bargaining.

Defendant, on the other hand, contends that the MSNG, while a state agency, is also a federal agency for purposes of application of the FSLRA, and that the Adjutant General, while a state officer, is by law charged with employing and administering the employment of guard technicians and in that respect, functions in a federal capacity. The Authority concludes, therefore, that the MSNG and the Adjutant General are subject to the jurisdiction of the Authority, and that the Authority's exercise of that jurisdiction is violative of

neither the Tenth nor Eleventh Amendment. For the reasons which follow, the court agrees.

This case finds the parties and the court at the intersection of the FSLRA and the National Guard Technicians Acts, 32 U.S.C. § 709 *et seq,* and a determination of the direction in which the court should proceed requires an understanding not only of the purpose of the FSLRA and the Authority's responsibility to covered employees, but also of the role of the National Guard and the employment status of Guard technicians. A succinct explanation of the latter was provided in *New Jersey National Guard v. Federal Labor Relations Authority*, 677 F.2d 276, 278-79 (3d Cir.1982), in which the court stated:

> The National Guard occupies a unique position in the federal structure. It is "an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war," and "also may be federalized in addition to its role under state governments, to assist in controlling civil disorders," *Gilligan v. Morgan*, 413 U.S. 1, 7, 93 S.Ct. 2440, 2444, 37 L.Ed.2d 407 (1973). As the successor to the state militias of the nation's early years, *see Maryland v. United States*, 381 U.S. 41, 85 S.Ct. 1293, 14 L.Ed.2d 205 (1965), the Guard fills a role recognized and provided for in the Unites States Constitution. Art. I, § 8, cl. 16; amend. II. This role does not fit neatly within the scope of either state or national concerns; historically, the Guard has been, and today, remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law.

Mirroring this special posture of the Guard is the sui generis status of its employees. In addition to purely military personnel, the Guard employs civilians to perform a wide

range of administrative, clerical, and technical tasks. Often the responsibilities and duties of these employees, who are generally referred to as National Guard technicians, correspond directly to those of other civilian employees, yet they arise in a distinctly military context, implicating significant military concerns. *See, e.g., NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir.1980).

To accommodate the civilian interests of these employees without intruding on the Guard's military and security needs, and to recognize by statute the special employee status that had evolved informally, Congress in 1968 enacted the National Guard Technician Act, 32 U.S.C. § 709. In that Act, all Guard technicians, who had previously been employees of the states, were declared to be federal employees, and were thereby afforded the benefits and rights generally provided for federal employees in the civil service. 32 U.S.C. § 709(d). The Act imposed special reservations to that federal civilian status, however. Specifically, Guard technicians were required to serve simultaneously as members of the National Guard, *id.* at § 709(b). . . .

In addition, while the Technicians Act recognized technicians as federal employees, Congress reserved "exclusive review of personnel actions affecting technicians for the state adjutants general," *American Fed. Gov't Employees, Local 3936*, 239 F.3d at 71 (observing that "[t]he legislative history of the Technicians Act . . . evidences 'serious congressional concern with ensuring the final authority of state adjutants general' ") (quoting *New Jersey Air Nat'l Guard v. Fed. Labor Relations Auth.*, 677 F.2d 276, 283 (3d Cir.1982)), giving him the exclusive authority, *inter alia,* to separate a technician from his employment at any time for cause, and to accomplish "a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation." 32 U.S.C. § § 709(f)(3), (f)(4). *See also New*

Jersey Air Nat. Guard v. Federal Labor Relations Auth., 677 F.2d 276, 284 (3d Cir.1982) ("[S]ection 709[(f)], which ensures the authority of the state adjutants general, can be viewed as a virtual quid pro quo for the section 709[(e)] grant of federal employee status.'");[11] *See also Singleton v. Merit Systems Prot. Bd.*, 244 F.3d 1331, 1333 (Fed.Cir.2001) (same explanation) (citing *Special Counsel v. Everett*, 28 M.S.P.R. 348, 350 (1985)).

From the foregoing, a number of matters are clear beyond dispute, including the "hybrid" federal/state status of the MSNG, the status of National Guard technicians as federal employees and the states' adjutants general's responsibility for administering the Technicians Act and their authority over matters relating to the employment of guard technicians. It also seems clear beyond dispute that every court that has considered the issue has held that national guard technicians, as federal employees who are not excluded from coverage of the FSLRA, fall within the coverage of that Act and thus have the right to choose union representation. *See, e.g., Association of Civilian Technicians, Schenectady Chap. v. Federal Labor Relations Auth.*, 230 F.3d 377, 378 (D.C.Cir.2000) (observing that "[a]s federal 'employees' (5 U.S.C. § 2105(a); 32 U.S.C. § 709(d)), the Guard's civilian

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[11] *See American Fed. Gov't Employees, Local 3936*, 239 F.3d at 71, in which the court quoted from the report of the Senate Committee on Armed Services relating to the Technicians Act:

> 'This bill implements the purpose [of the legislation] by converting the technicians to Federal employee status with certain controls on administration and supervision which would as a matter of law remain at the State level. In effect, the technicians will become Federal employees receiving the salaries, fringe and retirement benefits, but with certain administrative control regarding employment supervision remaining with the adjutants general of the jurisdiction concerned under regulations prescribed by the Secretary concerned.'

Id. (quoting *quoting* S.Rep. No. 90-1445, at 2 (1968)).

technicians are entitled to engage in collective bargaining regarding certain subjects"); *New York Council, Ass'n of Civilian Technicians v. Federal Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir.1985) (noting that "[t]the labor relations of federal employees are . . . regulated by Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. s 7101 *et seq.*, which requires agencies to bargain with their employees over the conditions of employment subject only to express statutory exceptions," and applying the Act to guard technicians); *New Jersey Air Nat'l Guard*, 677 F.2d at 281 (stating that although the FSLRA exempts the employees of certain executive agencies from its coverage, it "makes no reference whatsoever to the National Guard or National Guard technicians, and the technicians therefore fall within the implicit coverage of the Act.".)[12] And yet despite the countless cases recognizing this right, either explicitly or implicitly, plaintiffs in the case at bar maintain that the MSNG is not a "federal agency" under the FSLRA, and that even if it were, the MSNG does not employ or administer technicians' employment; rather, that function is committed to the sole authority of the Mississippi Adjutant General, who, himself being a state officer, is not subject to the FSLRA and hence is not subject to the jurisdiction of the Authority.

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[12] *See also National Federation of Federal Employees, Local 1623 v. Federal Labor Relations Auth.*, 852 F.2d 1349, 1350 (D.C.Cir.1988), in which the court explained:

> National Guard technicians are both civilian employees and enlistees in National Guard units. The two worlds they simultaneously inhabit are understandably governed by very different rules of employee-employer relations. As members of the Guard, technicians are subject to military authority; as civilian employees, they are covered by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § § 7101 et seq. (1982 & Supp. IV 1986) ("the Labor-Management Act") which permits them to bargain over conditions of their employment. 5 U.S.C. § 7103(a)(14)(C) (1982).

In the court's opinion, contrary to plaintiffs' contention, the MSNG is a federal agency for purposes of the FSLRA. The parties acknowledge that the obligations imposed by the FSLRA extended only to federal agencies. And as defendant notes, the statute defines "agency" to mean an "Executive agency," 5 U.S.C. § 7103(a)(3), which is in which is in turn defined as "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105. The Department of Defense is an "executive department," *see* 5 U.S.C. § 101, and 10 U.S.C. § 111(a); and the Department of the Army is a component of the Department of Defense, *see* 10 U.S.C. § 111(b)(6). The Department of the Army consists of the Regular Army, the Army National Guard of the United States, the Army National Guard while in service of the United States and the Army Reserve, *see* 10 U.S.C. § 3062(b)-(d); and the Army National Guard of the United States is the reserve component of the Army that consists in relevant part of the "federally recognized units and organizations of the Army National Guard," *see* 10 U.S.C. § 10105. As it is indisputably "a federally recognized unit[ ] and organization of the Army National Guard," the Mississippi Army National Guard (which is a subset of the MSMG), is thus an element of the Army National Guard of the United States, and hence falls within the definition of "activity" of an "agency," within the meaning of § 7103(a)(3) of the FSLRA, which extends to federal agencies and to "activities" of federal agencies. *See* 5 C.F.R. § 2421.4 ("Activity means any facility, organizational entity, or geographical subdivision or combination thereof, of any agency.").

Although plaintiffs dispute that the MSNG is a federal agency, they argue even more vigorously that irrespective of the status of the MSNG, the Adjutant General, who has sole authority with respect to the employment of technicians, is a state, not federal officer; and toward proving this preposition, they point out that by state statute, the Adjutant General is the "[e]xecutive head of the [Mississippi Military] department,

and, as such, subordinate only to the governor in matters pertaining thereto," Miss.Code Ann. § 33-3-3, and that he is also the chief military officer of the various parts of the Mississippi Militia, and thus is "[s]ubordinate only to the Governor in matters affecting the . . . militia of this state," Miss.Code Ann. § 33-3-7.

In fact, if it manifest, as plaintiffs contend, that the Adjutant General is a state officer. But defendants have not contended otherwise. Rather, defendants take the position that in employing and administering technicians under the Technicians Act, 32 U.S.C. § 709, the Adjutant General by federal law acts as the designee of the federal service secretaries pursuant to 32 U.S.C. § 709(d), and thus for purposes of compliance with the FSLRA, adjutants general, by federal law, act as the "duly authorized representatives" of the federal service secretaries.

Having reviewed what the court considers the relevant authorities, this court rejects plaintiffs' attempt to have it focus entirely on the Adjutant General's status as a state officer, in disregard of his duties and responsibilities as a federal employer. To accept plaintiffs' position in this case would be to ignore the indisputable fact that the Adjutant General's position vis-a-vis technicians' employment is governed by federal law, which in the court's opinion, fully supports the Authority's position that in his capacity as the employer of these federal employees, the Adjutant General acts as a federal employer; and in that capacity, he, like other nonexcepted federal employees, is subject to requirements of the FSLRA. In other words, just as the MSNG is a "hybrid" entity, existing as both a state and federal entity, sc, too, is the Adjutant General's position properly viewed as "hybrid" in that he performs certain functions, namely, employment of technicians, in a federal capacity.

Indeed, just as the courts have consistently recognized that states' National Guards are federal agencies for purposes of

the FSLRA, they have similarly recognized time and again that adjutants general are "hybrid federal and state officials," who function in a federal capacity, i.e., as a federal agent, in their role of employing and administering technicians' employment. For example, in *NeSmith v. Fulton*, 615 F.2d 196, 199 (5th Cir.1980), the Fifth Circuit specifically found that Georgia's Adjutant General was a federal agency with respect to technicians' employment. The court stated,

It is true that an adjutant general is at least in part a state officer. In *Davis v. Vandiver*, *supra*, 494 F.2d at 832, we observed:

> The principal purpose of the National Guard Technicians Act of 1968, 32 U.S.C. § 709 *et seq.*, was to create a bifurcated nature of technician employment to confer *federal* status on civilian technicians while granting administrative authority to *State* officials, headed in each state by the Adjutant General. (Emphasis in original.)

The legislative history of the National Guard Technicians Act also states clearly that Congress viewed the adjutants general as state officers. House Report No. 1823 stated that the authority of the adjutants general under 32 U.S.C. § 709 to employ and administer the civilian technician program was intended to

> (a) recognize the State character of the Guard and (b) meet the requirement of giving the adjutants general (who are State officers) the statutory function of employing federal employees. H.R.Rep. No. 1823, 90th Cong.2nd Sess. (1968); 1968 U.S.Code Cong. & Admin. News, pp. 3318, 3330.

However, that an adjutant general is a state officer does not preclude his simultaneously being a *federal agency*. The Third Circuit, in *Chaudoin v. Atkinson*, *supra*, 494 F.2d at 1329, held that although an adjutant general was a state rather than a federal officer unless called into active service, he was

also an "agency or agent" of the United States because "32 U.S.C. § 709 charges . . . (him) with employment and administration of the civilian technicians who are federal employees." *See also Vargas v. Chardon*, 405 F.Supp. 1348, 1351-52 (D.P.R.1975). The conclusion that an adjutant general is a federal agency as well as a state officer reflects the hybrid state-federal character of the National Guard and of the role of adjutants general in administering it. We therefore adopt it and find NeSmith's appeal timely because brought in a suit to which a federal agency is a party.

NeSmith v. Fulton, 615 F.2d 196, 199-200;[13] *See also Gilliam v. Miller*, 973 F.2d 760, 762 (9th Cir.1992) (stating, "We agree that the [Oregon Adjutant General's] personnel actions as supervisor over the federal civilian technicians are taken in the capacity of a federal agency."); *cf. Holdiness v. Stroud*, 808 F.2d 417, 421 (5th Cir.1987) (§ 1983 action, in which court stated that "although the National Guard Technician's Act confers federal status on civilian technicians 'while granting administrative authority to State officials, headed in each scale by the Adjutant General,' by virtue of the hybrid character of the Guard, the Adjutant General is, at least for some purposes, simultaneously a federal agent."); *Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir.1974) (holding that although the adjutant general of the state is not a "federal officer" for purposes of the mandamus statute giving federal courts jurisdiction to compel such officer to perform his duties, 28 U.S.C. § 1361, nevertheless, given that the Technicians Act, 32 U.S.C. § 709, "charges the adjutant generals with employment and administration of the civilian technicians who are federal employees . . . [,] there can be no doubt that the Adjutant General of Delaware is an agency or

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[13] *NeSmith* was a § 1983 action brought by a dual-status technician challenging his dismissal from his technician position and the denial of military reinlistment in the Georgia Air National Guard. Among those named as defendants by NeSmith was the adjutant general of Georgia.

an agent of the United States and therefore within the purview of § 1361."); *Vargas v. Chardon*, 405 F.Supp. 1348, 1351 (D.P.R.1975) (stating that although the defendant (adjutant general) is a state appointed officer, he in fact administers a federally funded activity and pursuant to regulations issued by the National Guard Bureau and as stated in (terminating the defendant's employment as a National Guard Technician) [,] the defendant acted as an agent of the Federal Government and therefore under color of federal not state law.); *cf. Perpich v. Department of Defense*, 496 U.S. 334, 347, 110 S.Ct. 2418, 2426 (1990) (recognizing that the dual system of the federal and state National Guard program remains unchallenged).[14] The court is of the opinion that the Authority may properly assert jurisdiction over the MSNG and the Adjutant General.[15]

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[14] While there are certainly a rather substantial number of opinions which identify states' adjutants general as "state actors"—typically in the context of § 1983 actions—the plaintiffs have not identified a single case holding that adjutants general are *exclusively* state agents/actors. Plaintiffs place great emphasis on the Supreme Court's statement in *Perpich* that although guard members have three "hats"—a civilian hat, a state militia hat, and an army hat—"only one [of those hats can be] worn at a particular time," 496 U.S. 334, 348, 110 S.Ct. 2418, 2426-27, 110 L.Ed.2d 312, suggesting that an adjutant general, who is at all times a state officer, cannot simultaneously be a federal agent. It occurs to the court that plaintiffs read too much into this statement, and that they wholly fail to take into account that the adjutant general is the employer of these federal employees 365 days a year.

[15] Plaintiffs rely on *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), in support of their contention that the Authority's exercise of jurisdiction over the MSNG and/or the Adjutant General violates the Tenth Amendment. *Printz* concerned the Brady bill, which required local law enforcement agencies to enforce federal gun control laws. The Court held the law unconstitutional, stating, "Congress cannot compel the States to enact or enforce a federal regulatory program." 521 U.S. at 895, 117 S.Ct. 2329. However, the conclusion that the MSNG and the Adjutant General function as federal agencies in administering the Technicians Act renders *Printz* inapposite. Here, there

In sum, it is impossible to recognize and give effect to the right of technicians as federal employees "to form, join, or assist any labor organization" without recognizing that in his role as their employer, the MSNG and/or the Adjutant General is a federal employer. The court, of course, is cognizant of the concerns which plaintiffs have expressed regarding the Authority's usurpation of the Adjutant General's authority; but in the court's opinion, these objections are not well founded as an objection in the context of a representation proceeding. The Authority has routinely addressed the issue of the authority of adjutants general under the Technicians Act as an issue of negotiability—or rather nonnegotiability—and has consistently refused to require collective bargaining over those matters reserved to the adjutants general. *See, e.g., New Jersey Air Nat'l Guard v. Federal Labor Relations Authority*, 677 F.2d 276 286 (3d Cir.1982) (recognizing that Guard technicians are federal employees and hence within the scope of the FSLRA, but holding that the Guard cannot be required to negotiate as to those matters which the Technicians Act has committed to the discretion of the state adjutants general); *State of Neb., Military Dept., Office of Adjutant General v. Federal Labor Relations Auth.*, 705 F.2d 945, 951 (8th Cir.1983) (observing that The FSLRA's legislative history "do[es] not provide an affirmative expression of congressional intent to override the specific provision for exclusive review of section 709 [(f)] matters by the state adjutants general in the technicians statute," and that Congress did not alter the Technicians Act's limit on review procedures when it enacted the FSLRA, and that as a consequence, matters covered by § 709(f) of the

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is no effort to compel the MSNG or the Adjutant General, in its/is capacity as state agents or officers, to enforce the FSLPA, but rather, the Authority's purpose is to compel a federal agency to comply with obligations imposed by federal law. For the same reason, plaintiffs' Eleventh Amendment argument fails.

Technicians Act were nonnegotiable). Simply put, it does not follow from the fact that there are matters over which adjutants general cannot be compelled to collectively bargain, that technicians, in the exercise of their right as federal employees, cannot choose to unionize and collectively bargain over matters that are negotiable.

For a similar reason, the court rejects plaintiffs' contention that the *Feres* doctrine and the considerations which animate the doctrine preclude the Authority's exertion of jurisdiction over the MSNG and/or the Adjutant General. As the courts and the Authority have recognized, military aspects of technicians' employment are not subject to negotiation. *See, e.g., Association of Civilian Technicians, Texas Lone Chapter 100 v. Federal Labor Relations Auth.*, 250 F.3d 778 (D.C.Cir.2001) (recognizing that "National Guard technicians may not negotiate over military aspects of civilian employment." and upholding Authority's determination that military regulation prohibiting "grade inversion" rendered Union's proposal in derogation of that regulation nonnegotiable as a matter of law); *Association of Civilian Technicians v. Federal Labor Relations Auth.*, 780 F.2d 12 (7th Cir.1985) ("Under § 7106(b)(1) [of the Technician Act] . . . the Guard may elect not to negotiate with civilian technicians on the subject of 'technology, methods, and means of performing work.' Pursuant to § 7105(a)(2)(E), civilian technicians may challenge the Guard's refusal to negotiate on a matter by petitioning the [FLRA] for a negotiability determination."); *Association of Civilian Technicians, Schenectady Chap.*, 230 F.3d at 378 (recognizing that "[f]or obvious reasons, Congress made it illegal for [technicians] to bargain over the terms and conditions of military service"); *New York Council, Ass'n of Civilian* Technicians, 757 F.2d 502 (while recognizing rights of technicians under FSLRA, holding that certain matters, such as Guard's requirement that technicians wear military attire, was nonnegotiable). But that does not

mean that technicians are precluded from organizing and bargaining over civilian aspects of their employment.

CONCLUSION

For all of the foregoing reasons, the court concludes that plaintiff's complaint for declaratory relief is not well taken and that their complaint must therefore be dismissed. Therefore, it is ordered that defendant's motion to dismiss, to the extent it challenges this court's jurisdiction, is not well taken and is denied, but that plaintiffs' complaint, is dismissed.

A separate judgment will be entered in accordance with Rule 53 of the Federal Rules of Civil Procedure.

APPENDIX E

STATE OF MISSISSIPPI
Office of the Governor
[Logo]

EXECUTIVE ORDER NO. 850

WHEREAS, the President of the United States has authorized and requested the Governor of the several States, Territories and United States possessions to use National Guard forces paid by federal funds to provide supplemental security personnel for airport operations; and,

WHEREAS, civil authorities require that the Mississippi National Guard provide such personnel to assist the Federal Aviation Administration in providing adequate security measures for Mississippi's airports:

NOW, THEREFORE, I, Ronnie Musgrove, Governor of the State of Mississippi, pursuant to the authority vested in me by Section 119 and Section 217, Mississippi Constitution of 1890, and Sections 7-1-5, 33-7-301 and 33-7-305, Mississippi Code of 1972, do hereby direct Major General James H. Lipscomb, Adjutant General of the Mississippi National Guard, to order out such officers and enlisted personnel of the Mississippi National Guard as he deems necessary and requisite and for such duration as he deems appropriate to assist federal, state and local civil authorities, including the Federal Aviation Administration in administering the aforementioned security measures. Such personnel are hereby authorized to be armed. Major General Lipscomb will be in direct command of the troops ordered to active duty and will use such equipment as may be found necessary in his opinion to accomplish the mission of the Mississippi National Guard troops.

The members of the Mississippi National Guard called to active duty under the provisions of this Order shall be subject

to the provisions, privileges and immunities of the Statutes of the State of Mississippi governing the Mississippi National Guard.

FURTHER, all funding for the necessary Mississippi National Guard personnel and support will be paid from the U.S. Department of Defense's "Defense Emergency Response Fund."

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed.

[Seal]

DONE at the Capitol in the City of Jackson, this the 28th day of September, in the year of our Lord two thousand and one, and of the two hundred and twenty-fifth year of the United States of America.

/s/ Ronnie Musgrove
RONNIE MUSGROVE
Governor

BY THE GOVERNOR

/s/ Eric Clark
ERIC CLARK
Secretary of State

APPENDIX F

UNITED STATES CONSTITUTION

U.S. Const., art. I, § 8, cls. 1, 15 & 16

The Congress shall have Power . . .

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress. . . .

U.S. Const., amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

APPENDIX G

THE CONSTITUTION OF THE STATE OF MISSISSIPPI
ADOPTED NOVEMBER 1, A.D., 1890
ARTICLE 5. EXECUTIVE

Section 119. Commander-In-Chief of military

The governor shall be commander-in-chief of the army and navy of the state, and of the militia, except when they shall be called into the service of the United States.

CROSS REFERENCES

Militia, power to call forth, see Art. 9, § 217; § 33-3-1 *et seq.*

APPENDIX H

UNITED STATES CODE
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III—EMPLOYEES
SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS
CHAPTER 71—LABOR-MANAGEMENT RELATIONS
SUBCHAPTER I—GENERAL PROVISIONS

§ 1204. Powers and functions of the Merit Systems Protection Board

(a) The Merit Systems Protection Board shall—

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

5 U.S.C. § 1204

§ 7103. Definitions; application

(a) For the purpose of this chapter—

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Printing Office, and the Smithsonian Institution[1] but does not include—

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

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[1] So in original. Probably should be followed by a comma.

(F) the Federal Labor Relations Authority;

(G) the Federal Service Impasses Panel; or

(H) the United States Secret Service and the United States Secret Service Uniformed Division.

5 U.S.C. § 7118. Prevention of unfair labor practices

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

TITLE 10. ARMED FORCES
SUBTITLE A—GENERAL MILITARY LAW
PART I—ORGANIZATION AND GENERAL MILITARY POWERS
CHAPTER 1—DEFINITIONS

§ 101. Definitions

(c) Reserve components.—The following definitions relating to the reserve components apply in this title:

(1) The term "National Guard" means the Army National Guard and the Air National Guard.

(2) The term "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

TITLE 10. ARMED FORCES
SUBTITLE A—GENERAL MILITARY LAW
PART I—ORGANIZATION AND GENERAL MILITARY POWERS
CHAPTER 15—INSURRECTION

§ 331. Federal aid for State governments

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

§ 332. Use of militia and armed forces to enforce Federal authority

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

§ 333. Interference with State and Federal law

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of

its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

TITLE 10. ARMED FORCES
SUBTITLE E—RESERVE COMPONENTS
PART I—ORGANIZATION AND ADMINISTRATION
CHAPTER 1003—RESERVE COMPONENTS GENERALLY

§ 10101. Reserve components named

The reserve components of the armed forces are:

(1) The Army National Guard of the United States.

(2) The Army Reserve.

(3) The Naval Reserve.

(4) The Marine Corps Reserve.

(5) The Air National Guard of the United States.

(6) The Air Force Reserve.

(7) The Coast Guard Reserve.

TITLE 10. ARMED FORCES
SUBTITLE E—RESERVE COMPONENTS
PART II—PERSONNEL GENERALLY
CHAPTER 1211—NATIONAL GUARD MEMBERS IN FEDERAL SERVICE

§ 12401. Army and Air National Guard of the United States: status

Members of the Army National Guard of the United States and the Air National Guard of the United States are not in active Federal service except when ordered thereto under law.

§ 12405. National Guard in Federal service: status

Members of the National Guard called into Federal service are, from the time when they are required to respond to the call, subject to the laws and regulations governing the Army or the Air Force, as the case may be, except those applicable only to members of the Regular Army or Regular Air Force, as the case may be.

§ 12406. National Guard in Federal service: call

Whenever—

(1) the United States, or any of the Territories, Commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation;

(2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or

(3) the President is unable with the regular forces to execute the laws of the United States;

the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the

rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.

TITLE 10. ARMED FORCES
SUBTITLE B—ARMY
PART I—ORGANIZATION
CHAPTER 307—THE ARMY

§ 3062. Policy; composition; organized peace establishment

(c) The Army consists of—

(1) the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve; and

(2) all persons appointed or enlisted in, or conscripted into, the Army without component.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES
CHAPTER 44—FIREARMS

§ 922. Unlawful acts

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I—CRIMES
CHAPTER 67—MILITARY AND NAVY

§ 1385. Use of Army and Air Force as posse comitatus

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

32 U.S.C. § 109

§ 109. Maintenance of other troops

(c) In addition to its National Guard, if any, a State or Territory, Puerto Rico, the Virgin Islands, or the District of Columbia may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, as its chief executive (or commanding general in the case of the District of Columbia) considers necessary, but it may not be called, ordered, or drafted into the armed forces.

TITLE 32. NATIONAL GUARD
CHAPTER 3—PERSONNEL

§ 301. Federal recognition of enlisted members

To be eligible for Federal recognition as an enlisted member of the National Guard, a person must have the qualifications prescribed by the Secretary concerned for the grade, branch, position, and type of unit or organization involved. He becomes federally recognized upon enlisting in a federally recognized unit or organization of the National Guard.

TITLE 32. NATIONAL GUARD
CHAPTER 3—PERSONNEL

§ 314. Adjutants general

(a) There shall be an adjutant general in each State and Territory, Puerto Rico, and the District of Columbia. He shall perform the duties prescribed by the laws of that jurisdiction.

(b) The President shall appoint the adjutant general of the District of Columbia and prescribe his grade and quailifications.

(c) The President may detail as adjutant general of the District of Columbia any retired commissioned officer of the Regular Army or the Regular Air Force recommended for that detail by the commanding general of the District of Columbia National Guard. An officer detailed under this subsection is entitled to the basic pay and allowances of his grade.

(d) The adjutant general of each State and Territory, Puerto Rico, and the District of Columbia, and officers of the National Guard, shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him.

TITLE 32. NATIONAL GUARD
CHAPTER 7—SERVICE, SUPPLY, AND PROCUREMENT

§ 709. Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in—

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)(1) A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who—

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(5) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(g) Sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(h) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

CODE OF FEDERAL REGULATIONS

TITLE 5—ADMINISTRATIVE PERSONNEL
CHAPTER XIV—FEDERAL LABOR RELATIONS AUTHORITY, GENERAL COUNSEL OF THE FEDERAL LABOR RELATIONS AUTHORITY AND FEDERAL SERVICE IMPASSES PANEL
SUBCHAPTER C—FEDERAL LABOR RELATIONS AUTHORITY AND GENERAL COUNSEL OF THE FEDERAL LABOR RELATIONS AUTHORITY
PART 2421—MEANING OF TERMS AS USED IN THIS SUBCHAPTER

§ 2421.4 Activity.

Activity means any facility, organizational entity, or geographical subdivision or combination thereof, of any agency.

5 C.F.R. § 2421.4

TITLE 33. MILITARY AFFAIRS
CHAPTER 3.—COMMANDER IN CHIEF, MILITARY DEPARTMENT, AND GOVERNOR'S STAFF

§ 33-3-1. Governor as commander in chief

The governor shall be commander in chief of the militia and each of the classes thereof, except when it is called into the service of the United States, and shall have power to call forth the militia to execute the laws, repel invasion, and to suppress riots and insurrections, and to perform such other functions as may be authorized by law.

§ 33-3-3. Composition of military department

There shall be in the executive branch of the state government a military department. The adjutant general shall be the executive head of the department and, as such, subordinate only to the governor in matters pertaining thereto. There shall be in such department at least one (1) assistant adjutant general for army, at least one (1) assistant adjutant general for air, such other assistant adjutants general as may be authorized by rules and regulations of the National Guard Bureau of the United States of America, and such other officers, enlisted men and civilian employees as the adjutant general shall, from time to time, determine.

§ 33-3-7. Appointment of Adjutant General

(1) The Governor shall nominate and, by and with the consent of the Senate, appoint and commission an Adjutant General, which appointment shall carry with it the rank of major general; provided, however, that if the person nominated is a retired officer who has attained a rank higher than that of major general he may, at the discretion of the Governor, retain such rank but his compensation shall not be increased above that amount hereinafter provided. The four-

year term of the Adjutant General shall expire with the expiration of the appointing Governor's term of office. The Adjutant General shall be chief of staff to the Governor, subordinate only to the Governor in matters affecting the military department and militia of this state.

(2) To be eligible for such appointment, the Adjutant General shall have attained at least the rank of Colonel, shall be eligible to receive federal recognition upon his appointment, and shall have served at least seven (7) years in the Armed Forces of the United States, either in active federal service or as a member of a reserve component, with at least three (3) years of such service in the Mississippi National Guard. At least five (5) years of such service shall have been as a commissioned officer.

CHAPTER 5.—THE MILITIA AND MISSISSIPPI STATE GUARD THE MILITIA

§ 33-5-1. Militia composition

The militia of the State of Mississippi shall consist of all able-bodied citizens of the state between the ages of seventeen (17) and sixty-two (62) years, who are not exempt by law of this state or of the United States, together with all other able-bodied persons who shall voluntarily enlist or accept commission, appointment or assignment to duty therein, subject to such classifications as may be hereinafter prescribed. The militia shall be divided into three (3) classes: The national guard, the Mississippi State Guard, and the unorganized militia. The unorganized militia shall consist of all persons liable to service in the militia, but not members of the national guard or the Mississippi State Guard.

A seventeen-year-old person shall not be allowed to enlist or be assigned to duty without the written consent of both parents, if living, or one (1) parent if one (1) is deceased, or if both parents are deceased, the guardian of such person.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[Filed Jul. 24, 2001]

Civil Action No. 4:01CV158LN

MAJOR GENERAL JAMES H. LIPSCOMB III, In his official capacities as THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI, OF THE MISSISSIPPI MILITIA, OF THE MISSISSIPPI NATIONAL GUARD, AND AS EXECUTIVE HEAD OF THE MISSISSIPPI MILITARY DEPARTMENT,

and

THE MISSISSIPPI MILITIA, THE MISSISSIPPI NATIONAL GUARD, AND THE MISSISSIPPI MILITARY DEPARTMENT,

Plaintiffs,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, In her official capacity as REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,

and

LINDA J. NORWOOD, In her former official capacity as ACTING REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,

Defendants.

COMPLAINT FOR EQUITABLE RELIEF ADDRESSING UNCONSTITUTIONAL FEDERAL ACTION

[Bench Trial Requested]

Pursuant to applicable law, including, Article I, Section 8, Clauses 12, 14, 15 & 16, of the United States Constitution, the Tenth and Eleventh Amendments to the United States Constitution, 15 U.S.C. § 2201 and Fed. R. Civ. P. 57, Plaintiffs: (1) Major General James H. Lipscomb III, in His Official Capacities as the Adjutant General ("TAG") of the State of Mississippi; (2) of the Mississippi Militia; (3) of the Mississippi National Guard; (4) and as Executive Head of the Mississippi Military Department; and (5) the Mississippi Militia ('MSM"); (6) the Mississippi National Guard ('MSNG"); and (7) the Mississippi Military Department ('MMD") (collectively "Militia Plaintiffs") by and through their counsel, file this Complaint for Equitable Relief Addressing Unconstitutional Federal Action ("Complaint") against Defendants: (1) Federal Labor Relations Authority ("FLRA"); (2) Nancy Speight, in her official capacity as Regional Director of The Federal Labor Relations Authority, Atlanta Region ("Speight"); and (3) Linda J. Norwood, in her former official capacity as Acting Regional Director of The Federal Labor Relations Authority, Atlanta Region ("Norwood"). In support of their Complaint, the Militia Plaintiffs would show unto the Court as follows:

JURISDICTION

Subject Matter

1. This Court has subject matter jurisdiction of this matter pursuant to 28 U.S.C. § 1331, as the matters at issue arise under the constitution and statutes of the United States of America.

2. Additionally and alternatively, this Court further has jurisdiction of this Action pursuant to 28 U.S.C. § 1343, as this matter concerns violations and deprivations of certain civil rights, civil liberties, privileges, rights and immunities, secured or reserved to the Militia Plaintiffs by the United States Constitution.

3. This Court further has jurisdiction of this matter pursuant to 28 U.S.C. § 1346, as the FLRA, a federal instrumentality and Speight and Norwood, federal officers, are named as Defendants.

4. Finally, this Court further has jurisdiction of this matter pursuant to 28 U.S.C. § 1361, as parts of this Action seek to compel certain FLRA officers, such as Speight and Norwood, to perform their official duties in a constitutional and otherwise lawful manner.

5. This Action seeks no monetary damages against or from any of the Defendants.

6. Speight and Norwood are named as Defendants herein solely in their respective official capacities.

7. The Militia Plaintiffs bring this Action in federal court recognizing that due to the presence of the FLRA, a federal instrumentality, and Speight and Norwood, federal officers, the case would necessarily be removed to federal court by Defendants as of right, should it have been first brought in state court. The Militia Plaintiffs, however, expressly reserve and retain each and every right, privilege, defense and immunity they may enjoy, whether constitutional, statutory, regulatory, common law or otherwise, including, without limitation, their rights, privileges and immunities under the Tenth and Eleventh Amendments to the United States Constitution, and bring this Action expressly subject to such reservation and retention.

In Personam

8. This Court has in personam jurisdiction over Defendants pursuant to Miss. Code Ann. § 13-3-57 (1972) and other applicablelaw.

9. The FLRA, Speight and Norwood have and are committing acts and omissions with respect to the Militia Plaintiffs within the State of Mississippi.

10. The FLRA is subject to general jurisdiction in the federal courts of the State of Mississippi.

PARTIES

11. The military forces of the State of Mississippi include, "[t]he organized militia, the state retired list, the state reserve list, and the Mississippi State Guard, and all other components of the militia of the state which may hereafter be organized." Miss. Code Ann. § 33-1-l(a).

12. Pursuant to Miss. Code Ann. § 33-1-l(d) the MSNG means "[tlhat part of the organized militia of this state which is organized, equipped and federally recognized under the provisions of the laws of the United States and of the State of Mississippi relating to the National Guard." *Id.* (emphasis added).

13. The Mississippi Army National Guard ("MSARNG") and Mississippi Air National Guard ("MSANG") are merely subsets of the MSNG's personnel.

14. The MSM, of which the MSNG is a subset, is composed of the "[nlational guard, the Mississippi State Guard, and the unorganized militia." Miss. Code Ann. § 33-5-1.

15. The Governor of Mississippi, not the President of the United States, is the Commander in Chief of the MSNG (unless activated into federal service).[1] Miss. Code Ann. § 33-3-1; Miss. Const. art. V, § 119.

16. The MSNG is not an organizational subcomponent of any United States active duty military unit.

17. The MSM is not an organizational subcomponent of any United States active duty military unit.

18. The MMD is not an organizational subcomponent of any United States active duty military unit.

19. The MMD is a department of the executive branch of the State of Mississippi. Miss. Code. Ann. § 33-3-3.

20. The MMD is a state agency.

21. The MSNG is an entity entitled to Eleventh Amendment immunity.

22. The MSM is an entity entitled to Eleventh Amendment immunity.

23. TAG is an official entitled to Eleventh Amendment immunity.

24. TAG is the "[e]xecutive head of the department [MMD], and, as such, subordinate only to the governor in matters pertaining thereto." Miss. Code Ann. § 33-3-3.

25. TAG is the military "[c]hief of staff to the Governor, subordinate only to the Governor in matters affecting the military department and militia. . ." of Mississippi. Miss. Code Ann. § 33-3-7.

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[1] The Militia Plaintiffs concede that the President, but not the FLRA, has certain authority over individual guardsmen, by virtue of their dual enlistment in the National Guard of the United States of America, a federal reserve component.

26. TAG is a state militia officer, as well as a state agency head.

27. The FLRA is a federal instrumentality, headquartered in Washington, DC. Its address is 607 14th Street, NW, Washington, DC 20424- 0001.

28. The FLRA may be served with process according to the terms of Fed. R. Civ. P. 4(i).

29. Speight is the current Regional Director of the FLRA, Atlanta Division.

30. Norwood served as the Acting Regional Director of the FLRA, Atlanta Division during the time of many of the acts and omissions at issue in this Action.

31. Speight may be served with process according to the terms of Fed. R. Civ. P. 4(i).

32. Norwood may be served with process according to the terms of Fed. R. Civ. P. 4(i).

33. The Defendants' acts and omissions alleged herein are and were committed jointly, severally and/or in concert.

VENUE

34. Venue is proper pursuant to 28 U.S.C. § 1391(a) & (e), as the Southern District of Mississippi is the judicial district in which a substantial part of the events or omissions giving rise to these claims occurred or accrued.

35. Venue is also proper as the Southern District of Mississippi is the judicial district in which the Militia Plaintiffs have their principal place of military business.

36. A substantial part of the acts and omissions at issue in this Action occurred or accrued or will occur or accrue in Meridian, Mississippi.

37. Meridian, Mississippi is the situs of a number of units, operations and personnel which are among the putative subjects and objects of Defendants' acts and omissions at issue in this Action.

38. The following units contain personnel which, without limitation, are among the putative subjects and objects of Defendants' acts and omissions at issue in this Action:

(a) Co G, 185th AV
1551 65th Avenue South
Meridian, MS 39307-7024;

(b) HQ (-) , 150th Cbt Engr Bn
1551 65th Avenue South
Meridian, MS 39047-7024;

(c) HC, 150th Cbt Engr Bn
1551 65th Avenue South
Meridian, MS 39307-7024;

(d) Army Aviation Support Facility (AASF - Meridian)
1551 65th Avenue South
Meridian, MS 39307-7024; and

(e) Organizational Maintenance Shop (OMS) - 11
1860 60th PL
Meridian, MS 39307-7102

FACTS

Procedural History

39. On April 11, 2000, putatively pursuant to the Federal Service Labor Management Act, § U.S.C. 5 7001 *et. seq.* ('FSLMA'), the Association of Civilian Technicians ("ACT"), a union, filed a petition with the FLRA seeking an election to determine if it should be the exclusive representative of "[a]ll wage grade and general schedule employees employed by the Mississippi Army National Guard statewide."

40. Subsequently, on October 4, 2000, the MSNG confirmed in writing its prior request to the FLRA for a full hearing, pursuant to 5 CFR § 2422.17 and other law, on both the appropriateness of the proposed bargaining unit and associated issues, including constitutional and statutory issues.

41. By an order dated October 24, 2000, the FLRA granted MSNG's request for a hearing '[t]o address the issues raised in the petition.

42. Pursuant to the FLRA's November 16, 2000 order, an administrative hearing on this matter was held on December 6-7, 2000.

43. On February 28, 2001, Norwood, who was then serving as Acting Regional Director of the FLRA's Atlanta Region, issued a "Decision and Order and Direction of Election" ("RD Decision").

44. The RD Decision rejected every substantive argument raised by the MSNG at the hearing and in MSNG's post-hearing brief, and granted the ACT'S Petition.

45. The RD Decision directed that a union election be held, absent the filing of a timely Application for Review.

46. On April 30, 2001, pursuant to 5 CFR § 2422.31, the RD Decision and applicable law, MSNG timely submitted an "Application for Review of Regional Director's 'Decision and Order and Direction of Election'" ("Application for Review").

47. The Application for Review raised constitutional and statutory challenges to the actions of the FLRA and Norwood.

48. That Application for Review is incorporated herein by reference.

49. Speight was appointed as Regional Director of the FLRA's Atlanta Division in or about June, 2001.

50. On June 29, 2001, the FLRA, Washington, DC, issued a "Decision and Order on Application for Review" ("FLRA Decision").

51. The FLRA Decision upheld the overwhelming majority of the RD Decision.

52. The FLRA Decision found in part that the FLRA [d]oes not rule on the constitutionality of the Statute [FSLMA]." (FLRA Decision at 9.)

53. There is no statutory right of direct appeal from the FLRA Decision.

54. If the RD Decision and the FLRA Decision are implemented, the Militia Plaintiffs will suffer irreparable harm through the violation of their constitutionally and statutorily protected privileges, rights and immunities.

55. Further, Defendants' past and continuing acts and omissions in having putatively subjected the Militia Plaintiffs to Defendants' directives has caused and is causing the Militia Plaintiffs to suffer irreparable harm.

56. Absent relief from this Court in this Action, the Militia Plaintiffs have no adequate remedy by which they can address the irreparable harm and constitutional violations the Defendants are inflicting and seeking to inflict.

The Defendants Wrongful Acts and Omissions

Violation of Federal Statutes and Regulations

57. It is axiomatic that a tribunal, whether it be a court or an administrative agency like the FLRA, must have subject matter jurisdiction before it can proceed to adjudicate a dispute.

58. The FLRA is governed strictly by the statute from which it derives its existence, and equitable considerations in support of its jurisdiction are inappropriate for judicial inquiry.

59. 5 U.S.C. § 7105(a) (1) of the FSLMA grants the FLRA power "[f]or carrying out the purpose of this chapter."

60. Amongst the FLRA's statutory powers are the powers to"[d]etermine the appropriateness of units, to "[r]esolve issues relating to the duty to bargain in good faith" and to "[r]esolve complaints of unfair labor practices." *Id.* at (a) (2) (A) , (E) & (G).

61. In that regard, the FSLMA requires that "[a]n agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative," 5 U.S.C. § 7111(a), and that an "[a]gency . . . shall meet and negotiate in good faith" with the selected labor union. 5 U.S.C. § 7114(a)(4).

62. Thus, the responsibility to recognize a federal union, as well as to bargain with it, falls upon an "agency," as defined by the FSLMA.

63. Importantly, the FSLMA defines "agency" as "[a]n Executive Agency" of the federal government. 5 U.S.C. § 7103(a)(3).

64. However, neither the MSNG, the MSM, the MMD nor TAG are a part of the Executive Branch of the federal government and therefore are not an "agency" as defined by the FSLMA.

65. Neither the MSNG, the MSM, TAG nor the MMD meet the definition of an Executive "agency" as set forth by 5 U.S.C. 7103(a)(3).

66. As a result, none of them have any obligation to recognize a federal union or to negotiate a collective bargaining unit therewith.

67. Apparently recognizing the unavoidable import of the plain statutory language, Defendants have taken the alternative position that MSNG, and perhaps TAG, MSM or MMD, are somehow a federal "activity," under FLRA regulations.

68. The putatively applicable regulation, 5 CFR § 2421.4, states:

> Activity means any facility, organizational entity, or geographical subdivision or combination thereof, of any agency.

Id.

69. Section 2421.4 has three subparts and none of them fit this situation.

70. First, neither the MSNG, TAG, the MSM nor the MMD are a "facility" of any federal executive agency.

71. Second, each state's militia is a unique entity and is not an "organizational entity" of some federal executive agency.

72. Third, neither the MSNG, TAG, MSM nor the MMD are "geographical subdivisions" of some federal executive agency.

73. Until and unless properly federalized, the MSNG, MMD and the MSM are entities commanded by TAG and ultimately the Governor of the State of Mississippi.[2]

74. Neither MSNG, TAG, MMD nor the MSM are subdivisions of any federal agency or active component military unit.

75. Thus, just as these entities are not an "agency" under the Act, they likewise are not an "activity" under FLRA regulation 5 CFR § 2421.4.

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[2] The Militia Plaintiffs do not concede that all of these entities are subject to proper federalization.

76. 5 CFR § 2421.4 is the only federal regulatory test for determining what is an "activity" under the FSLMA.

77. The practical import of this is simple: neither the MSNG, TAG, MSM nor the MMD have any statutory obligation to recognize any federal union, and likewise have no duty to engage in collective bargaining under the FSLMA.[3]

78. As the FLRA's sole statutory authority is to administer the FSLMA with respect to those persons and entities subject to it, the FLRA therefore has no authority over the MSNG, TAG, MSM or the MMD and no lawful power to act against the Militia Plaintiffs.

79. As a result, the Defendants' actions are an unlawful attempted usurpation of the Militia Plaintiffs' state powers and are a violation of federal law.

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[3] Importantly, the Militia Plaintiffs are not contending herein that the Department of Defense ("DOD"), the Departments of the Army ('DA") or the Air Force ("DAF"), or for that matter the National Guard Bureau ('NGB") , have the right to participate in the FSLMA scheme on MSNG's behalf. MSNG's technicians are employed and administered solely by TAG, and none of these federal entities enjoy the right to engage in collective bargaining with MSNG's technicians. In this regard, MSNG agrees that "[t]he NGB is without authority to engage in collective bargaining on behalf of the states . . . . " *FLRA, DOD and ACT, Washington National Guard et. al.*, 55 FLRA No. 115 at 19 (July 30, 1999). Under both the first and second militia clauses, U.S. Const. art. I, § 8, cls. 15 & 16, as well as the clear dictates of 32 U.S.C. § 709 , neither DOD, DA, DAF nor NGB have either the constitutional or statutory authority to bargain with MSNG's technicians. The employment and administration of MSNG's technicians is a matter vested by section 709 and other law in TAG, not those federal entities. In sum, the Militia Plaintiffs are simply not subject to the FSLMA, no matter who does the bargaining.

Violation of the
Militia Plaintiffs' Constitutional Rights

80. The Defendants' acts and omissions are in direct contravention of the United States Supreme Court's decision in *Printz v. United States*, 521 U.S. 898, 935 (1997).

81. TAG is a state officer, one who administers a state agency (MMD), is the executive head of the MMD, and commands the MSM, including its subcomponent the MSNG.

82. In addition to serving as the chief military officer of the various parts of the MSM, pursuant to 32 U.S.C. § 709, TAG "[e]mploy[s] and administer[s]" excepted service technicians ("Military Technicians").[4]

83. Due to these facts, were a union such as ACT to organize the Militia Plaintiffs' technicians, the FSLMA would purport to require the Militia Plaintiffs to bargain with the union and administer the FSLMA federal union scheme.

84. The Petition filed by ACT, and allowed to proceed by the Defendants, includes Military Technicians, and seeks to force MSNG (a state entity), MMD (a state agency) and TAG (a state officer)[5] to administer the FSLMA with respect to MSNG Military Technicians.

85. The Defendants seek to force the Militia Plaintiffs to hold an election for potential organization of a union, recognize a federal union should ACT prevail in the election, to negotiate with a federal union and to interact with it on the terms set forth in the FSLMA and its attendant FLRA regulations.

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[4] The Militia Plaintiffs are not challenging herein their participation in the federal technicians' program. Rather, this Action challenges the application of the FSLMA to the Militia Plaintiffs, not 32 U.S.C. § 709.

[5] The Militia Defendants concede that certain types of claims against the Militia Defendants, including TAG, may give rise to federal subject matter jurisdiction.

86. However, as the FSLMA is a federal regulatory scheme, such an attempted commandeering of a state official and state entities is patently unconstitutional.

87. In that regard, the United States Supreme Court re-ently held that:

> Congress cannot compel the States to enact or enforce a federal regulatory program. [Further,] Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Printz v. United States, 521 U.S. 898, 935 (1997).

88. The issue under consideration here is not TAG'S administration of the Technician Act, but rather the FLRA's conscription of some or all of the Militia Plaintiffs to administer the FSLMA, an entirely separate federal act.

89. Here, the Defendants are seeking to conscript and dragoon MSNG, TAG, MSM and MMD into administering and participating in a federal regulatory scheme, the FSLMA, which is separate and apart from the Technician Act.

90. However, under *Printz*, such a commandeering would be and is a violation of the Militia Plaintiffs' state sovereignty and the Tenth Amendment to the United States Constitution.

91. A union such as ACT, is a "citizen" as contemplated by the Eleventh Amendment to the United States Constitution.

92. Thus, to the extent the Defendants' actions are at the behest of, or in concert with a private party such as a union like ACT, Defendants' actions, including any judicial enforcement action, would be and are a violation of Militia Plaintiffs' state sovereignty and the Eleventh Amendment to the United States Constitution.

93. It is long been the law that Congress must [m]ake its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Will v. Michisan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

94. [I] f Congress' intends to alter the 'usual constitutional balance between the States and the Federal Government, it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Greqory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

95. The FSLMA does not meet the strict standard of the "plain statement rule."

Violation of the
Separation of Powers, States' Rights
the Feres Doctrine, the Nonjusticibility Doctrine
and the Doctrine of Intramilitary Immunity

96. Contrary to the acts and omissions of Defendants, no bargaining unit may lawfully contain any 32 U.S.C. § 709 excepted service technicians (Military Technicians).

97. Military Technicians are essentially soldiers, and unionization is *per se* incompatible with their military duties and the Militia Plaintiffs' military mission.

98. The MSNG is a dual purpose organization. It has both a state and a federal mission and uses a variety of personnel in the furtherance of those missions.

99. The MSNG, TAG, MSM and MMD variously utilize: Active Guard/Reserve personnel ("AGR") ; civilian personnel under Titles 5 and 32 of the United States Code; Military Technicians under 32 U.S.C. § 709; state military employees;

state civilian employees; contract employees; state active duty militiamen and "traditional" or "M-day"[6] guardsmen, (under Title 32 U.S.C./Title 33 of the Mississippi Code).

100. With respect to the Militia Plaintiffs' respective full-time personnel, perhaps the most important distinction that can be drawn is between those whose positions are military in character and those whose positions are predominately civilian in character.

101. For example, AGR, Military Technician and military state employees all must be current members of the MSNG in order to hold their full-time positions.

102. AGR positions are inherently and irreducibly military in character.

103. Military state employee positions are inherently and irreducibly military in character.

104. Military Technician positions are inherently and irreducibly military in character.

105. In the course of their full-time positions, the Militia Plaintiffs' respective AGR, Military Technician and military state employees wear their military uniforms, observe military courtesy, may hold security clearances, may deal with live ordinance, may perform work upon or operate military aircraft or weapons systems, may deal with classified materials, and do perform tasks that are essentially and irreducibly military in character.

106. In contrast, civilian technicians (or competitive technicians under Title 5 or Title 32 of the United States Code), as well as the civilian state employees, are just that: civilians. While they may work in a military organization and perform

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[6] "M-day" is a national guard abbreviation for "mobilization day."

some unique functions, their positions are not necessarily inherently military in character.[7]

107. Prior to 1968, there was no such thing as Military Technicians.

108. In contrast, the prior version of 32 U.S.C. § 709 provided for so-called "caretakers and clerks," who were military capacity state militia personnel, paid with federal dollars.

109. The 1968 Technician Act replaced this class of militia personnel with Military Technicians.

110. In that regard, "[t]he principal purpose of the National Guard Technician Act of 1968, . . . was to create a bifurcated nature of technician employment-to confer federal status on civilian technicians while granting administrative authority to State officials, headed in each State by the Adjutant General." *Davis v. Vandiver*, 494 F. 2d 830, 832 (5th Cir. 1974).

111. Prior to the National Guard Technician Act, the states had difficulty funding retirement and fringe benefit programs for their respective state militia "caretakers and clerks."

112. Further, there were real issues about whether these state military employees enjoyed the protections of sovereign immunity. Thus:

> Federal employee status was authorized for civilian technicians [Military Technicians] in order "(a) to provide a retirement and fringe benefit program which will be both uniform and adequate; (b) to recognize the military requirements and the State characteristics of the

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[7] That is not to say, however, that claims by these pure "civilian" employees are always justiciable. Even certain claims by pure "civilian" personnel of the Militia Plaintiffs may be nonjusticiable under certain circumstances. *Meister v. Texas Adjutant General's Dept.*, 233 F. 3d 332, 339 (5th Cir. 2001) (citing *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971)).

> National Guard by providing for certain statutory administrative authority at the State level with respect to the technician program; (c) to clarify the technician's legal status which in certain areas has been the subject of conflicting court decisions, especially on the matter of whether technicians are covered under the Federal Tort Claims Act regarding third party actions against the United States government."

NeSmith v. Fulton, 615 F.2d 196, 201 & n. 9 (5th Cir. 1980) (quoting H.R. Rep. No. 1823, 90th Cong., 2nd Sess. (1968), 1968 U.S. Code Cong. & Admin. News, p. 3319).

113. Although Congress nominally federalized this class of personnel, it was careful to do two things. First, "[o]ne of the express purposes of the National Guard Technicians Act was to 'recognize the military characteristics of the National Guard' by requiring civilian technicians [Military Technicians] to be military members of the National Guard . . . ." *NeSmith*, 615 F.2d at 201 (quoting H.R. Rep. No. 1823, 90th Cong., 2nd Sess. (1968), 1968 U.S. Code Cong. & Admin. News, p. 3319).

114. This is because, while "[f]ormally, a civilian technician [Military Technician] is a federal civil employee outside the competitive civil service. In substance, however, the position is one in a military organization." *NeSmith*, 615 F.2d at 201.

115. Military Technicians are essentially soldiers.

116. Military Technicians: wear a military uniform; perform military duties; may handle ordinance, weapons and munitions; observe military courtesy; and generally perform duties perhaps identical to that performed in their M-day status.

117. Second, Congress recognized and effectuated the respective states' control over these Military Technician

militia-personnel "[b]y providing for their supervision by the adjutants general pursuant to regulations prescribed by the secretary of the relevant military department.." *Id.*

118. This statutory retention of command authority and control by the Adjutants General, set forth in 32 U.S.C. § 709(c), was intended to prevent any inference that technician nominal federalization for the purposes of pay, retirement benefits and sovereign immunity (the real purposes of the Technician Act), would somehow remove Military Technicians from the control of their Adjutants General. *Id.*

119. Military Technicians are only nominally federal employees, and that status was imposed only as an accommodation to the respective states' militias.

120. In substance, Military Technicians are the modern-day state militia personnel, successors to the "caretakers and clerks, long used by each state's Guard.

121. The Technician Act clearly reflects Congress' intent that the imposition of nominal federal employment status on these soldiers, would not in any way diminish the authority of the Adjutants General to command and administer these militia-personnel, whose "[p]osition[s] [are] one in a military organization." *NeSmith*, 615 F.2d at 201.

122. TAG's personnel decisions regarding MSNG Military Technicians are military personnel decisions.

123. A host of United States Supreme Court and Fifth Circuit cases have held that military personnel decisions are nonjusticiable in civilian fora.

124. For example, servicemen cannot assert claims against the military, their superiors or other servicemen for wrongs which arise from activities incident to service. *U.S. v. Stanley*, 483 U.S. 669, 683-84 (1987); *Chamell v. Wallace*, 462 U.S. 296, 304-05 (1983); *Feres v. United States*, 340 U.S. 135, 142 (1950).

125. This prohibition, known as the *Feres* Doctrine, flatly prohibits suits against the United States military and military personnel for injuries which arise "incident to service."

126. The Supreme Court's holdings in *Feres, Chamell*, and *Stanley* are premised upon two major concerns: the separation of powers set out in the constitution and the disruption servicemen suits cause to military efficiency and national security.

127. Stated simply, [c] ivilian courts may not sit in plenary review over intraservice military disputes." *Crawford v. Texas Air Natll Guard*, 794 F.2d 1034, 1035 (5th Cir. 1986).

128. The National Guard is clearly military in character. *Wriqht v. Park*, 5 F.3d 586, 588 (1st Cir. 1993).

129. The National Guard is an integral part of this country's military structure and an essential component of the armed forces. *Holdiness v. Stroud*, 808 F.2d 417, 421 (5th Cir. 1987).

130. Accordingly, the national guard is part and parcel of the military. *Farmer v. Mabus*, 940 F.2d 921, 923-25 (5th Cir. 1991).

131. Clearly, the prohibition against suit by service members against the military and military personnel enunciated by *Feres, Chamell*, and *Stanlev* applies with equal force to suits against the national guard itself, by "guardsmen" whose claims are incident to service. *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 (7th Cir. 1993).

132. Further, lawsuits by supposedly 'civilian" individuals whose "claim" arose incident to military-style duties are also prohibited.

133. In fact, in a recent case involving a Mississippi Air National Guard technician, a court expressly held that Mississippi Military Technicians may not challenge military

personnel decisions in civilian courts or fora. *Hassenfratz v. Garner*, 911 F. Supp. 235, 236 (S.D. Miss. 1995).

134. The *Hassenfratz* court found that "[w]e, too, conclude that, since National Guard [civilian] technicians' positions are encompassed within a military organization and require the performance of work directly related to national defense, such positions are themselves military in nature." *Hassenfratz*, 911 F. Supp. at 236.

135. For that reason, personnel actions concerning these "civilian" military positions are every bit as nonjusticiable as those by M-day Guardsmen themselves. *Id.; see Preslev v. Jackson Municipal Airport Authority*, 94 F. Supp. 2d 755, 758-764 (S.D. Miss. 2000) (finding that a "civilian" fire-fighter's ADA claim against the MMD was nonjusticiable, despite the fact that he was not even a member of the Mississippi National Guard).

136. It would be irrational therefore, if the *Feres*-bar to such litigation could be circumvented by the FLRA's administrative scheme and an attempt by Defendants to force the Militia Plaintiffs to engage in collective bargaining.

137. Ultimately, the FLRA's orders are enforced via judicial mechanisms. *E.g.*, 5 U.S.C. § 7123(b) ("The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order").

138. However, if other federal statutory claims by Military Technicians, some of which have administrative under-pinnings, are nonjusticiable when they reach federal court, then the same result must obtain with the FSLMA.

139. Contrary to the acts and omissions of Defendants, there is no principled reason to treat the FSLMA any differently from any of the other common law, constitutional or statutory schemes.

140. This is because the refusal of courts and administrative agencies to embroil themselves in internal military affairs is not dependent on the nature of the putative claim or the relief sought by the Military Technician.

141. The Defendants' only explanation for escaping the long line of precedent rendering Military Technician personnel decisions nonjusticiable and *Feres*-barred is their conclusion that while "[mlilitary matters relating to the employment of military technicians are beyond the Authority's purview, . . . this does not prohibit the inclusion of Military Technicians in an otherwise appropriate bargaining unit," as the FLRA supposedly "retains jurisdiction over civilian matters concerning National Guard Technicians." (RD Decision at 9.)

142. However, contrary to the Defendants' position, all a Military Technician's duties are "incident to his service" in the National Guard.

143. In sum, the modern incarnation of the *Feres* Doctrine, coupled with the inextricably military nature of Military Technicians, renders military personnel decisions, even those concerning matters supposedly subject to bargaining under the FSLMA, flatly nonjusticiable and *Feres*-barred.

144. As such, the Defendants have no authority to adjudicate matters involving the Militia Plaintiffs' Military Technicians, and the Defendants are acting unlawfully by attempting to include the Military Technicians in a collective bargaining unit.

CLAIMS

Count I

145. The Militia Plaintiffs incorporate by reference the preceding averments of their Complaint.

146. The acts and omissions of the Defendants are in violation of federal statutory and regulatory law.

Count II

147. The Militia Plaintiffs incorporate by reference the preceding averments of their Complaint.

148. The acts and omissions of the Defendants are in violation of the United States Constitution, including, but not limited to, the Tenth and Eleventh Amendments to the United States Constitution.

Count III

149. The Militia Plaintiffs incorporate by reference the preceding averments of their Complaint.

150. The acts and omissions of the Defendants are in violation of the United States Constitution, the Separation of Powers Doctrine, the *Feres* Doctrine, the Nonjusticiability Doctrine and the Doctrine of Intramilitary Immunity.

PRAYER

151. The Militia Plaintiffs incorporate by reference the preceding averments of their Complaint.

152. The Militia Plaintiffs pray that this Court grant them and award them judgment against the Defendants, jointly and severally, as follows:

Declaratory Judgment

(1) Pursuant to 28 U.S.C. § 2201, the acts and law cited above, as well as Fed. R. Civ. P. 57, a judgment declaring that:

(a) the application of the FSLMA to the Militia Plaintiffs is in violation of applicable federal statutes and regulations, and in excess of Defendants' lawful authority, and that therefore, the Militia Plaintiffs are simply not subject to the FSLMA;

(b) the application of the FSLMA to the Defendants is in violation of applicable constitutional rights, privileges and immunities enjoyed by the Militia Plaintiffs, and that therefore, the application of the FSLMA to the Militia Plaintiffs is unconstitutional and prohibited;

In the Alternative

(c) the application of the FSLMA to the Militia Plaintiffs with respect to Military Technicians is in violation of applicable federal statutes and regulations and/or applicable constitutional rights, privileges and immunities enjoyed by the Militia Plaintiffs, and that therefore, the application of the FSLMA to the Militia Plaintiffs is unlawful and prohibited with respect to Military Technicians;

Injunctive Relief

(2) A temporary and preliminary injunction, enjoining the Defendants to maintain the status quo pending the outcome of this Action;

(3) A preliminary and permanent injunction, prospectively prohibiting Defendants from:

(a) enforcing the FSLMA against the Militia Plaintiffs;

(b) conscripting and dragooning the Militia Plaintiffs to enforce or administer the FSLMA and the FLRA's orders;

(c) forcing the Militia Plaintiffs to engage in collective bargaining with or to recognize any union;

(d) taking any enforcement action against the Militia Plaintiffs based on the matters at issue in this Action;

(e) taking any action to hold a union election or otherwise process such a request with respect to the Militia Plaintiffs;

In the Alternative

(f) requiring the Militia Plaintiffs to recognize any union containing, or to bargain with, any actual or prospective bargaining unit containing Military Technicians; and

Alternative and Additional Relief

(4) Such further prospective injunctive, declaratory or other equitable relief to which the Militia Plaintiffs may be justly entitled under applicable law.

This the 24th day of July, 2001.

Respectfully submitted,

MAJOR GENERAL JAMES H. LIPSCOMB III, IN HIS OFFICIAL CAPACITIES AS THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI, OF THE MISSISSIPPI NATIONAL GUARD, OF THE MISSISSIPPI MILITIA AND AS EXECUTIVE HEAD OF THE MISSISSIPPI MILITARY DEPARTMENT, and THE MISSISSIPPI MILITIA, THE MISSISSIPPI NATIONAL GUARD and THE MISSISSIPPI MILITARY DEPARTMENT

/s/ E. Barney Robinson III
E. Barney Robinson III (MSB # 9432)
Jeffrey A. Walker (MSB #6879)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. 4:01cv158LN

MAJOR GENERAL JAMES H. LIPSCOMB III, In his official capacities as THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI, OF THE MISSISSIPPI MILITIA, OF THE MISSISSIPPI NATIONAL GUARD, AND AS EXECUTIVE HEAD OF THE MISSISSIPPI MILITARY DEPARTMENT,

and

THE MISSISSIPPI MILITIA, THE MISSISSIPPI NATIONAL GUARD, AND THE MISSISSIPPI MILITARY DEPARTMENT,
Plaintiffs,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, In her official capacity as REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,

and

LINDA J. NORWOOD, In her former official capacity as ACTING REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,
Defendants.

County Of Hinds)
)
State Of Mississippi)

AFFIDAVIT OF LTC EDGAR Y. HILL

LTC Edgar Y. Hill, being duly sworn, deposes and says:

1. My name is Edgar Y. Hill. I am over twenty-one years of age and of sound mind. I have personal knowledge of, and am competent to testify about all of the matters set out in this Affidavit.

2. I am a member of the Mississippi Army National Guard ("MSARNG"). I hold the rank of Lieutenant Colonel. My duty unit is HQ STARC(-), MSARNG. My duty assignment is Military Personnel Officer.

3. Additionally, I serve as a Title 32 U.S.C. § 709 excepted service technician ("Military Technician") in the Mississippi Air National Guard ("MSANG").

4. My unit of assignment for my Military Technician duties is HQ STARC(-), MSARNG. That unit is located in Jackson, MS.

5. Ultimately, ten Military Technicians are subject to my direct control or supervision.

6. I, like all Military Technicians, military state employees ("State Military Employees") and Active Guard/Reserve personnel ("AGR") in the Mississippi National Guard, wear a military uniform and observe military courtesy while in the course of my Military Technician duties.

7. I have served in the MSNG for approximately 33 years.

8. My official title is Supervisory, Personnel Management Specialist ("SPMS"). As the SPMS, I am responsible for the full range of technician personnel matters of the MSNG, both Army and Air. My responsibilities include personnel administration for Title 32 United States Code competitive technicians ('Civilian Technicians") and 32 U.S.C. § 709 excepted service Military Technicians. The number of technicians in the MSNG fluctuates, sometimes daily. However,

as of August 4, 2001, there were 966 technicians in the MSARNG, of which 919 were Military Technicians and 47 were Civilian Technicians. Likewise, as of that same date there were 481 technicians in the MSANG, of which 477 were Military Technicians and 4 were Civilian Technicians. I administer a comprehensive personnel office, which includes areas of classification, staffing, employee services and education.

9. My office announces positions, certifies applicants and receives applications for technician positions. After applications come back from the selection committee, we certify that all the regulatory requirements are met, and we approve them based on delegated authority from the Adjutant General of the State of Mississippi ("TAG").

10. I am a branch chief. My other title is Chief, Technician Personnel Management Branch. My branch is under the jurisdiction of the Human Resources Office.

11. My office, ultimately subject, of course, to the Adjutant General's control, is responsible for Military and Civilian technicians in both the MSARNG and MSANG.

12. Military Technicians must be a member of the MSNG as a condition of holding a technician position.

13. The Mississippi Military Department ("MMD") and the MSNG utilize: AGR personnel; Civilian Technicians; Military Technicians; state employees that are required to be members of the MSNG in order to hold their state employment position ('Military State Employees"); state employees that are not required the MSNG ('Civilian State Employees"); one Title 5 to be members of employee, who is a competitive civil servant; contract employees; and traditional M-Day Guardsman.

14. TAG is ultimately responsible within the MSNG for employing and administering Civilian and Military Technicians.

15. The unionization of Military Technicians would be detrimental to the operations and efficiency of the Mississippi National Guard. The effect on our operations in several areas would be hampered. Military Technicians are essentially soldiers. Many of our MSNG units utilize Military Technicians to perform duties that are essentially military in character.

16. The MSNG has Military Technicians that: handle live ordinance; handle live ammunition; deal with classified materials; operate military vehicles; operate armored and tracked vehicles; engage in live fire exercises; run military firing ranges; control the flight paths of military aircraft; fly military aircraft; control an air to ground gunnery range; administer a military firefighter/crash-rescue team; transport, secure, and maintain automatic and crew-served weapons; and perform other military duties while in a Military Technician status.

17. Often, MSNG Military Technicians engage in duties and activities while in a technician status that are no different from those performed by AGR and M-Day Guardsmen while they are in those two statuses.

18. The use of Military Technicians is essential to the functioning of HQ STARC(-) and the MSNG as a whole.

19. Like myself, my Military Technicians report to the Adjutant General, and ultimately the Governor of Mississippi. The MSNG is a dual mission entity. It has both a state and a federal mission, and uses a variety of personnel in furtherance of those missions. Like all the states' Guards, the MSNG operates with a mix of state and federal funding.

20. In a typical active component Armed Forces, the unit is able to function unit in the United States on year round through the utilization of active duty soldiers, sailors and airmen. However, as "traditional" Guardsmen normally perform their duties only on a part-time basis, the MS'NG, like every other state's Guard, must have certain full-time personnel to staff and maintain operations year-round.

21. Decades ago, the State of Mississippi, as well as Congress recognized this need, and together they have created a variety of positions, staffed by a variety of personnel to run the MSNG's operations when its "traditional" or mobilization day ("M-day") Guardsmen are away at their civilian occupations. The MSNG, and its concomitant state agency, the MMD, thus utilize a variety of personnel in the accomplishment of its mission. These include: AGR personnel; Civilian Technicians; Military Technicians; State Military Employees; State Civilian Employees; Title 5 federal employees; contract employees; and M-day guardsmen, under Title 32 U.S.C./Title 33 of the Mississippi Code. These personnel work together in furtherance of a common mission.

22. Perhaps the most important distinction that can be drawn between these various classes of personnel is that some of the positions are inherently military in nature and some are not. For example, MMD has custodial employees whose positions are entirely civilian in nature. Some of the pure civilian employees utilized by MMD and MSNG are state employees, and others are nominal federal employees who are employed and administered by TAG.

23. In contrast, MMD and MSNG have certain full-time personnel who engage in inherently military activities on a day to day basis, such as: maintaining and operating military weapons systems and equipment; flying military aircraft;

handling ordinance and other explosives; running live fire ranges; and other duties which are undisputedly military in nature.

24. Within the context of positions that are inherently military, the Militia Plaintiffs use three classes of personnel. The first of these is what are called AGR soldiers. These personnel are a type of active duty militia soldier, who serve under the command of TAG, in the MSNG. The second category of inherently military personnel is Military State-Employees. These personnel are technically state employees of the MMD, but are required to be a member of the MSNG, wear their uniform during their performance of duty in their full-time position, observe military courtesy and protocol and function effectively as a soldier in their full-time position.

25. The final category of military capacity full-time personnel is 32 U.S.C. § 709 excepted service Military Technicians. Military Technicians are M-day Guardsmen who also hold a full-time position with MSNG. Like Military State Employees, Military Technicians are required to be a member of the MSNG, to wear their military uniform in the performance of their technician duties, observe military courtesy and protocol, and perform duties that are military in nature.

26. On April 11, 2000, the Association of Civilian Technicians ("ACT") filed a petition with the Federal Labor Relations Authority ("FLRA"') seeking an election to determine if it should be the exclusive representative of "[a]ll wage grade and general schedule [technician] employees employed by the Mississippi Army National Guard statewide." Subsequently, on October 4, 2000, the MSNG confirmed in writing its prior request to the FLRA for a full hearing, on both the appropriateness of the proposed bargaining unit and associated issues.

27. By an order dated October 24, 2000, the FLRA granted MSNG's request for a hearing "[t]o address the issues raised in the petition." Pursuant to the FLRA's November-16, 2000 order, a hearing on this matter was held on December 6-7, 2000.

28. On February 28, 2001, Linda J. Norwood, Acting Regional Director of the FLRA's Atlanta Region, issued a "Decision and Order and Direction of Election" ("RD Decision"). A true and correct copy of that decision is attached hereto as exhibit 1.

29. On April 30, 2001, pursuant to 5 CFR § 2422.31, the RD Decision and applicable law, MSNG timely submitted an "Application for Review of Regional Director's 'Decision and Order and Direction of Election' ("Application for Review"). The Application for Review raised constitutional and statutory challenges to the actions of the FLRA and Norwood.

30. On June 29, 2001, the FLRA, Washington, DC, issued a "Decision and Order on Application for Review" ("FLRA Decision"). The FLRA Decision upheld the overwhelming majority of the RD Decision. A true and correct copy of the FLRA Decision is attached hereto as exhibit 2.

31. Subsequent to the entry of the FLRA Decision, an FLRA official contacted the undersigned and counsel for the Militia Plaintiffs and informed the Militia Plaintiffs through counsel that the FLRA intended to order a union election, should the parties not first agree to an election voluntarily.

32. As a result, on Tuesday, July 24, 2001, the Militia Plaintiffs filed the instant Action.

33. Neither the MSNG, the MMD, the Mississippi Militia ("MSM") nor TAG are an agency of the Executive Branch of the federal government.

34. Neither the MSNG, TAG, the MSM nor the MMD are a "facility" of any federal executive agency. The MSNG, TAG, the MSM and the MMD are not an "organizational entity" of some federal executive agency. Further, neither the MSNG, TAG, the MSM nor the MMD are "geographical subdivisions" of some federal executive agency. The MSNG is commanded by the TAG and ultimately the Governor of Mississippi. It is not a subdivision of any federal agency or active component military unit.

35. The union petition by ACT, which includes Military Technicians, seeks to force MSNG (a state entity), MMD (a state agency) and TAG (a state officer) to administer the Federal Service Labor Management Act ("FSLMA") with respect to MSNG Military and Civilian Technicians. The petition seeks to force TAG to recognize a federal union, to negotiate with it and to interact with it on the terms set forth in the FSLMA and its attendant FLRA regulations.

36. Military Technicians are essentially soldiers, and unionization is per se incompatible with their military duties and the MSNG's mission. In order to understand this issue, it is helpful to take a look at the different types of personnel utilized by the MSNG.

37. The MSNG is a-dual-purpose organization. It; has both a state and a federal mission and uses a variety of personnel in the furtherance of those missions. With respect to its full-time personnel, perhaps the most important distinction that can be drawn is between those that are military and those that are civilian.

38. For example, MSNG's AGR, Military Technician and Military State Employees all must be current members of the MSNG in order to hold their full-time positions. All of them wear their military uniform in their full-time positions,

observe military courtesy, may hold a security clearance, perform tasks essentially military in character and may deal with classified materials.

39. In contrast, MSNG's Civilian Technicians (or competitive technicians), as well as its civilian state employees, are just that: civilians. While they may work in a military organization and perform some unique functions, all their positions are not necessarily inherently military in character.

40. Importantly, the various categories of personnel utilized by the MSNG, the MMD and the MSM must work together towards a common goal, the accomplishment of our military mission. In that regard, most of the time, military positions in the MSNG's full-time structure are position/function-driven, and not keyed to any particular class of military personnel. For example, if the position is military in nature, depending on funding and personnel numbers allocation, it might be filled with a Military State Employee, an AGR soldier or a Military Technician.

41. The interjection of unionization into our Military Technician force would disrupt the commander/subordinate relationship. It effectively could result in the interjection of a parallel, but nonmilitary quasi-chain of command and grievance system, in conflict with TAG'S otherwise broad military authority to employ and administer technicians according to the dictates of military and operational necessity. Such is inherently incompatible with the irreducibly military nature of Military Technician service and would be an improper challenge to the authority of TAG to command, employ and administer the MSNG's Military Technicians.

42. Unionization of Military Technicians is inherently incompatible with both the military duties of and the military nature of Military Technician service. If unionized, Military Technicians could have a new negotiated grievance procedure that would likely be different from the present grievance procedure. The imposition of this new parallel grievance

procedure would not only impose additional administrative burdens on the MSNG and TAG, it also would also have a chilling effect on the exercise of normal military command authority, by causing concern that certain orders, directives and decisions would be subject to challenge outside the normal command chain. Further, certain disputes taken up through the union grievance chain could ultimately be subject to binding arbitration and/or adjudication by civilians at the FLRA, not TAG himself, in derogation of TAG's authority. This system would be unique to MMD and MSNG's unionized Military Technician personnel, as it would not apply to AGR and Military State Employees, whose positions and duties are often interchangeahle with that of Military Technicians. Such would harm the commander/subordinate relationship, engender suspicion and perhaps enmity between the various classes of military personnel and would likely generate substantial and repeated contests of military personnel actions.

43. Further, Military Technicians often work directly with soldiers in an AGR and/or M-day status, for example during advance party operations prior to a training mission or Field Training Exercise ("FTX"). Such interaction also occurs in the course of military flight operations and in other common contexts. In the current environment, in such situations, both the Military Technicians, as well as the AGR and M-day Guardsmen interact with their superiors on a military command basis. Should MSNG's Military Technicians be unionized, this continuity of operations and interaction will be disrupted.

44. TAG has not delegated or ceded any of his authority to employ and administer technicians, including Military Technicians , to the State of Mississippi, MSM, the MSNG or the MMD. It is true, however, that TAG has delegated, subject to his ultimate control, certain authority over technicians to certain subordinate officers and NCOs, all of whom answer to TAG, and ultimately the Governor of Mississippi.

45. Attached hereto as composite exhibit 3 are true and correct copies of certain portions of the ACT Webpage.

46. Attached hereto as composite exhibit 4 is a true and correct copy of certain portions of the sworn transcript with certain exhibits from the administrative hearing held by the FLRA on December 6-7, 2001. The exhibits to exhibit 4 are true and correct copies of certain documents. The identity and source of those documents is described in detail in the sworn testimony contained in the hearing transcript. Those documents are reports, records or data compilations, made at or near the time by, or from information transmitted by, persons with knowledge, and are kept in the normal course of the plaintiffs' military business. It was a regularly conducted military business activity of the plaintiffs to keep such records.

47. ACT is a private union.

FURTHER AFFIANT SAYETH NOT.

This the 6th day of August, 2001.

/s/ Edgar Y. Hill
LTC EDGAR Y. HILL

SWORN TO AND SUBSCRIBED BEFORE ME, this the ____ day of August, 2001.

/s/ Karen Babington Hatten
Notary Public

My Commission Expires:

_____ [Seal]

NOTARY PUBLIC STATE OF MISSISSIPPI
My Commission expires Feb. 1, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. 4:01cv158LN

MAJOR GENERAL JAMES H. LIPSCOMB III, In his official capacities as THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI, OF THE MISSISSIPPI MILITIA, OF THE MISSISSIPPI NATIONAL GUARD, AND AS EXECUTIVE HEAD OF THE MISSISSIPPI MILITARY DEPARTMENT,

and

THE MISSISSIPPI MILITIA, THE MISSISSIPPI NATIONAL GUARD, AND THE MISSISSIPPI MILITARY DEPARTMENT,

Plaintiffs,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, In her official capacity as REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,

and

LINDA J. NORWOOD, In her former official capacity as ACTING REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,

Defendants.

County Of Hinds)
)
State Of Mississippi)

AFFIDAVIT OF COLONEL ROGER L. SHIELDS

Colonel Roger L. Shields, being duly sworn, deposes and says:

1. My name is Colonel Roger L. Shields. I am over twenty-one years of age and of sound mind. I have personal knowledge of, and am competent to testify about all of the matters set out in this Affidavit.

2. I am a member of the Mississippi Army National Guard ("MSARNG"). I hold the rank of Colonel. My duty unit is Headquarters State Area Command ("HQ STARC"). I am the Chief of Staff ("COS") of the MSARNG.

3. Neither the Mississippi National Guard ("MSNG"), the Mississippi Military Department ("MMD"), the Mississippi Militia ("MSM"), nor the Adjutant General of the State of Mississippi ("TAG") are a federal agency of the Executive Branch of the federal government of the United States of America.

4. Neither the MSNG, TAG, the MSM, nor the MMD are a facility of any federal executive agency.

5. Neither the MSNG, TAG, the MSM, nor the MMD are an organizational entity of some federal executive agency.

6. Neither the MSNG, TAG, the MSM nor the MMD are a geographical subdivision of some federal executive agency.

7. Neither the MSNG, TAG, the MSM, nor the MMD are an organizational subcomponent of any United States armed forces active duty unit.

8. During much of the time when TAG is employing and administering 32 U.S.C. § 709 excepted service technicians ("Military Technicians"), TAG is not formally on any federal military orders.

FURTHER AFFIANT SAYETH NOT.

This the 27th day of July, 2001.

/s/ Roger L. Shields
COL Roger L. Shields

SWORN TO AND SUBSCRIBED BEFORE ME, this the 27th day of July, 2001.

/s/ [Ineligible]
Notary Public

My Commission Expires:
31 Aug 01

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. 4:01cv158LN

MAJOR GENERAL JAMES H. LIPSCOMB III, In his official capacities as THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI, OF THE MISSISSIPPI MILITIA, OF THE MISSISSIPPI NATIONAL GUARD, AND AS EXECUTIVE HEAD OF THE MISSISSIPPI MILITARY DEPARTMENT,

and

THE MISSISSIPPI MILITIA, THE MISSISSIPPI NATIONAL GUARD, AND THE MISSISSIPPI MILITARY DEPARTMENT,
Plaintiffs,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, In her official capacity as REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,

and

LINDA J. NORWOOD, In her former official capacity as ACTING REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,
Defendants.

County of Hinds)
)
State of Mississippi)

SECOND
AFFIDAVIT OF LTC EDGAR Y. HILL

LTC Edgar Y. Hill, being duly sworn, deposes and says:

1. My name is Edgar Y. Hill. I am over twenty-one years of age and of sound mind. I have personal knowledge of, and am competent to testify about all of the matters set out in this Affidavit.

2. I am a member of the Mississippi Army National Guard ("MSARNG"). I hold the rank of Lieutenant Colonel. My duty unit is HQ STARC(-), MSARNG. My duty assignment is Military Personnel Officer.

3. Additionally, I serve as a Title 32 U.S.C. § 709 excepted service technician ("Military Technician") in the Mississippi Air National Guard ("MSANG").

4. My unit of assignment for my Military Technician duties is HQ STARC(-), MSARNG. That unit is located in Jackson, MS.

5. The Plaintiffs in this case: Major General James H. Lipscomb III, in His Official Capacities as the Adjutant General ("TAG") of the State of Mississippi; of the Mississippi Militia; of the Mississippi National Guard; and as Executive Head of the Mississippi Military Department; and the Mississippi Militia ("MSM"); the Mississippi National Guard ("MSNG"); and the Mississippi Military Department ("MMD") (collectively "Militia Plaintiffs"), have suffered injuries due to the Defendants' actions which are at issue in this case. The Militia Plaintiffs have been damaged because some of them have been involuntarily dragged through an administrative process by the Defendants since soon after April 11, 2000, when the Defendants first sought to dragoon some of the Militia Plaintiffs into a Federal Service Labor Management Act ("FSLMA"') proceeding. The Militia Plaintiffs have had to devote time and personnel to:

correspond with FLRA officials; prepare for and conduct an administrative hearing on December 6-7, 2000; serve numerous motions and briefs; prepare and submit an appeal of the Regional Director's February 28, 2001 Decision and Order (the "RD Decision"); and prepare for the conduct of an involuntary union election of the Mississippi Army National Guard's technician force.

6. TAG employs and administers technicians 365 days a year. At various times while administering technicians TAG is on some form of MSNG orders, but at other times he is not on any form of Title 32 orders and is serving in his state militia and state agency head positions.[1]

7. Further, even if the above were not the case, the State of Mississippi, the MMD and the MSM are suffering injuries in fact. As the MSNG is a state entity, Defendants' coercive actions against it are injuring the state, not just MSNG. Some of the personnel that have had to respond to the Defendants' actions have been in a state status as MMD or MSM personnel.

8. Injecting different conditions of employment for technicians, through unionization, will have a negative impact on the MSM and MMD's personnel, who must work hand-in-hand with technicians on a daily basis. In that regard, the Militia Plaintiffs have strived to minimize the differences in how these various classes of military personnel are treated and administered. The interjection of any further differences in the way Military Technicians, as opposed to AGR soldiers and State Military Employees are administered, disciplined or otherwise employed, would be detrimental to the operations

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[1] At various times TAG may be: on Active Duty for Training ("ADT") orders; Individual Duty for Training ("IDT") orders; State Active Duty ("SAD") orders; Active Duty for Special Work ("ADSW) orders or potentially (but unlikely), on Title 10 Active Duty ("AD") orders. At other times, he may also be on no orders at all.

and efficiencies of the militia. The effect on the Militia Plaintiffs' operations in several areas would be hampered.

9. Mississippi has had periods of time when the then TAG was not a current member of the MSNG at all. The current full-time MSARNG Assistant Adjutant General, BG Elton Berry, does not hold federal recognition and is not a member of the MSNG. Despite this fact, Mississippi law authorizes BG Berry, "[i]n the case of death, absence or inability of the Adjutant General to act, [to] perform the duties of the Adjutant General until the Adjutant General shall resume his duties or until a successor shall be appointed . . . ." Miss. Code Ann. 33-3-9.

10. The current TAG, MG James H. Lipscomb III, was appointed as TAG by Governor Ronnie Musgrove on July 6, 2000, and began serving as TAG on that same date. He was confirmed by the Mississippi Senate on January 19, 2001. He did not receive federal recognition in the Army National Guard of the United States of America until May 25, 2001.

FURTHER AFFIANT SAYETH NOT.

This the 23rd day of August, 2001.

/s/ Edgar Y. Hill
LTC Edgar Y. Hill

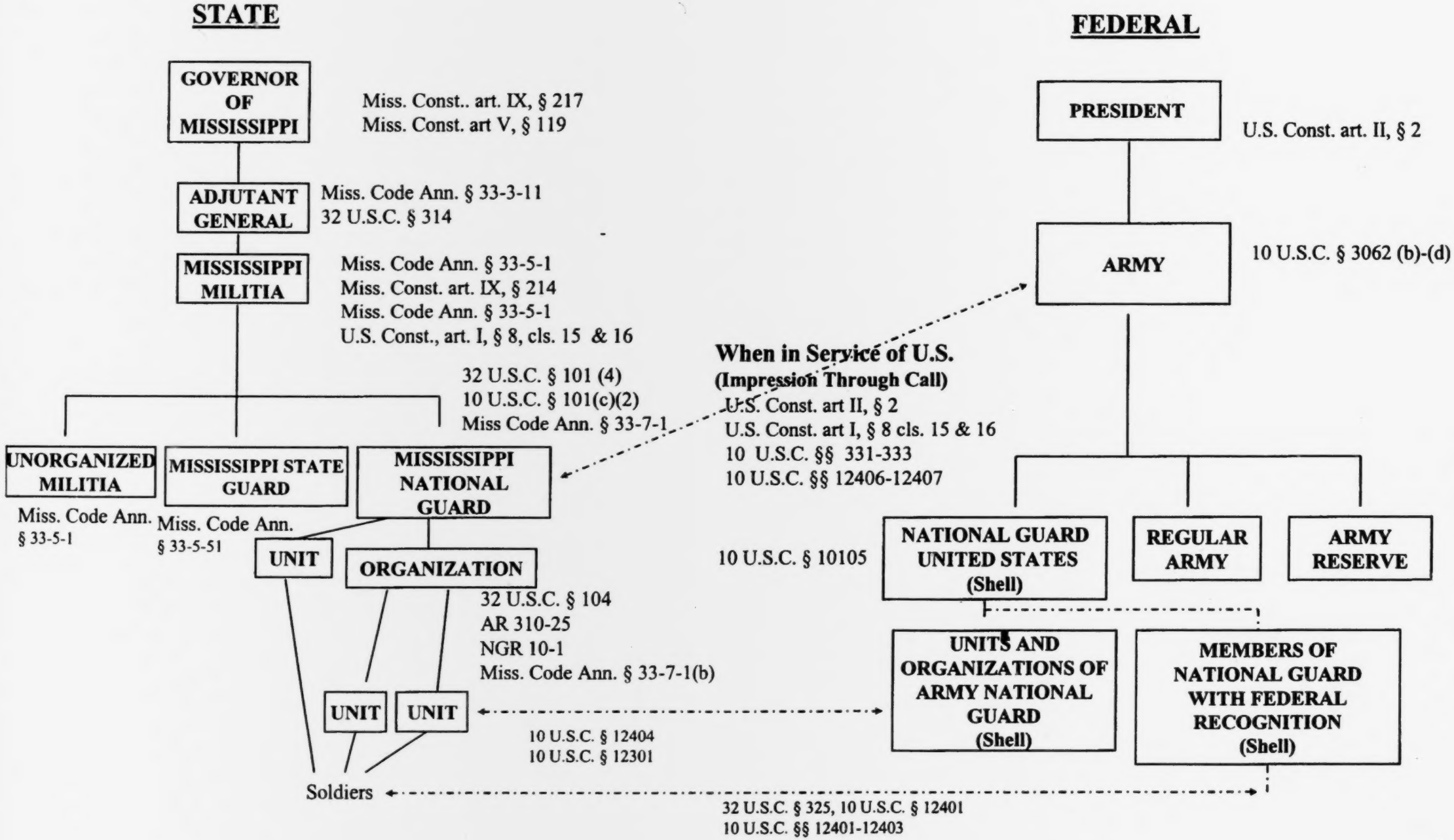
SWORN TO AND SUBSCRIBED BEFORE ME, this the 23rd day of August.

/s/ [Ineligible]
Notary Public

My Commission Expires:
31 Aug 2001

APPENDIX J

MG Lipscomb, et. al. v. FLRA, et. al.



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(3)

No. 03-737

In the Supreme Court of the United States

JAMES H. LIPSCOMB III, ET AL., PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Adjutant General of a state National Guard unit, and the National Guard unit itself, are subject to the requirements of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et sq.*, when they act in their capacity as employers of National Guard civilian technicians, who are designated by statute to be federal employees.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-18a) is reported at 333 F.3d 611. The opinion of the district court (Pet. App. 22a-47a) is reported at 200 F. Supp. 2d 650.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2003. A petition for rehearing was denied on August 22, 2003 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101 *et seq.*, governs federal-sector collective bargaining. The FSLMRS provides, *inter alia*, that "[e]ach employee shall have the right to form, join, or assist any labor organization." 5 U.S.C. 7102. The term "employee" is defined to include any individual who is "employed in an agency." 5 U.S.C. 7103(a)(2)(A). The term "agency" is in turn defined to mean "an Executive agency * * *, the Library of Congress, [and] the Government Printing Office." 5 U.S.C. 7103(a)(3). The FSLMRS is administered by respondent Federal Labor Relations Authority (FLRA or Authority). See 5 U.S.C. 7104-7105.

2. The National Guard Technicians Act of 1968 (Technicians Act), 32 U.S.C. 709, provides for the employment by local National Guard units of civilian "technicians" who perform a variety of administrative, clerical, and technical tasks. The Secretary of the Army or the Air Force is directed to "designate" the Adjutant General (AG) of the relevant state national guard "to employ and administer the technicians authorized by" the Technicians Act. 32 U.S.C. 709(d). Critically for this case, the statute further provides that "[a] technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. 709(e).

3. In April 2000, the Association of Civilian Technicians (ACT), a union representing civil technicians of various National Guard units around the country, filed a petition with the FLRA, seeking an election to determine whether the union should be the exclusive representative of civilian technicians employed by peti-

tioner Mississippi Army National Guard (MSANG). Pet. App. 4a, 26a. Pursuant to 5 C.F.R. 2422.17, petitioner Mississippi National Guard (MSNG) requested, and the FLRA regional office held, a hearing to determine the appropriateness of the proposed bargaining unit. Pet. App. 26a. In February 2001, the regional office issued an order granting the union's petition for an election and rejecting petitioner MSNG's opposition. *Id.* at 4a-5a, 26a. Petitioner MSNG sought review by the full FLRA, which upheld the regional office's decision in June 2001. *Id.* at 5a, 26a.

4. After the FLRA issued its ruling, petitioners filed the instant suit. Petitioners sought a declaratory judgment to the effect that (1) the MSANG is not a federal agency subject to the requirements of the FSLMRS, (2) the FLRA's order that an election be held violates the Tenth and Eleventh Amendments to the United States Constitution, and (3) the employees involved cannot be represented by a union because they are military personnel. Pet. App. 26a-27a. Petitioners also sought a preliminary injunction forbidding the Authority from conducting the election. *Id.* at 27a.

The district court dismissed petitioners' suit for failure to state a claim upon which relief can be granted. Pet. App. 19a-21a (final judgment), 22a-47a (opinion). The court held that it had subject matter jurisdiction to adjudicate petitioners' claims, and that those claims were ripe for review. *Id.* at 27a-34a. The court concluded, however, that petitioners' claims failed on the merits. *Id.* at 35a-47a. The court explained that "every court that has considered the issue has held that national guard technicians, as federal employees who are not excluded from coverage of the [FSLMRS], fall within the coverage of that Act and thus have the right to choose union representation." *Id.* at 38a. And, while

acknowledging that Mississippi's Adjutant General is a state officer, the court agreed with the Authority that, "in his capacity as the employer of these federal employees, the Adjutant General acts as a federal employer." *Id.* at 41a. The court explained that "it is impossible to recognize and give effect to the right of technicians as federal employees 'to form, join, or assist any labor organization' without recognizing that in his role as their employer, the MSNG and/or the Adjutant General is a federal employer." *Id.* at 45a (quoting 5 U.S.C. 7102). The court rejected petitioners' Tenth and Eleventh Amendment claims on the ground that the FLRA did not seek "to compel the MSNG or the Adjutant General, in its/[his] capacity as state agents or officers, to enforce the [FSLMRS], but rather, the Authority's purpose is to compel a federal agency to comply with obligations imposed by federal law." *Id.* at 45a n.15.

5. The court of appeals affirmed. Pet. App. 3a-18a. Relying on 32 U.S.C. 709(e), the court found it "indisputable that the technicians of the MSANG are 'employees of an Executive agency' under the coverage terms of the [FSLMRS]. They therefore have the right to choose union representation, as indeed numerous cases have acknowledged." Pet. App. 9a (brackets in original). Because the state Adjutant General is charged by the Technicians Act with the responsibility of directing and supervising the civilian technicians, who are designated by that Act as federal employees, the court of appeals concluded that the AG when acting in his capacity as the technicians' employer is an "Executive agency" for purposes of the FSLMRS. *Id.* at 12a-13a. Like the district court, the court of appeals also held that the AG's status as a federal agency, when acting as employer of the civilian technicians, foreclosed

petitioners' Tenth and Eleventh Amendment claims. *Id.* at 14a-15a n.7.

Based on its assessment of the AG's status, the court of appeals concluded that the MSANG and MSNG also are "executive agencies for the purpose of FLRA authority and this legal proceeding." Pet. App. 16a. That is so, the court explained, "because [the MSANG and MSNG] exist and operate under the authoritative direction and control of the adjutant general—indeed they are merely the adjuncts of his office, under whom, and on whose behalf, civilian technicians work." *Ibid.* The court of appeals concluded that petitioners had offered "no persuasive reason to reject decades of settled practice and the decisions of [the court's] sister circuits, which have upheld the organizational rights of national guard civilian technicians under the [FSLMRS]." *Id.* at 17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should be denied.

1. "The National Guard occupies a unique position in the federal structure," *New Jersey Air Nat'l Guard* v. *FLRA*, 677 F.2d 276, 278 (3d Cir.), cert. denied, 459 U.S. 988 (1982), with its organization and functions reflecting a dual federal-state character. The National Guard is "an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war," and it "may be federalized * * * to assist in controlling civil disorders." *Ibid.* (quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 7 (1973)); see 32 U.S.C. 102. Its activity, makeup, and functions are primarily governed by federal law. 677 F.2d at 279. At the same

time, however, the National Guard—which is the modern-day organized militia, see U.S. Const. Art. I, § 8, Cl. 16; *Perpich* v. *DOD*, 496 U.S. 334, 341-346 (1990) —is "a state agency under state authority and control." *New Jersey Air Nat'l Guard*, 677 F.2d at 279.

In addition to purely military personnel, Guard units employ "dual-status" technicians to perform a wide range of administrative, clerical, and technical tasks. See *New Jersey Air Nat'l Guard*, 677 F.2d at 279. Since the enactment of the Technicians Act in 1968, each "dual-status" technician has been designated by statute as "an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. 709(e).[1] The courts of appeals that have considered the question have uniformly concluded that, in light of the technicians' express statutory designation as federal employees, those workers possess the protections—including the right to bargain collectively through union representatives—conferred by the FSLMRS. See, *e.g.*, *New Jersey Air Nat'l Guard*, 677 F.2d at 284; *California Nat'l Guard* v. *FLRA*, 697 F.2d 874, 879 (9th Cir. 1983); *Nebraska Military Dep't* v. *FLRA*, 705 F.2d 945, 952-953 (8th Cir. 1983); *Indiana Air Nat'l Guard* v. *FLRA*, 712 F.2d 1187, 1190 n.3 (7th Cir. 1983); *United*

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[1] In order to be a National Guard civilian technician, an individual must also hold a military position in the Guard, 32 U.S.C. 709(b), unless the position has been designated by the Secretary of Defense as a position "to be filled only by a non-dual status technician," 32 U.S.C. 709(c)(1). This case, however, involves the federal employment rights of the technicians only in their capacity as civilian employees.

States Dep't of Def. v. *FLRA*, 982 F.2d 577, 578 (D.C. Cir. 1993).[2]

When a state National Guard unit is not acting in a federalized military capacity, it is headed by an Adjutant General, who must be designated by the appropriate Secretary of the Army or of the Air Force "to employ and administer the technicians authorized" by the Technicians Act. 32 U.S.C. 709(d). Although an Adjutant General is for many purposes a state officer, he functions as a federal agency in his administration of the National Guard technicians program. See, *e.g.*, *Gilliam* v. *Miller*, 973 F.2d 760, 762 (9th Cir. 1992) ("We agree that the [Oregon Adjutant General's] personnel actions as supervisor over the federal civilian technicians are taken in the capacity of a federal agency."); *NeSmith* v. *Fulton*, 615 F.2d 196, 199 (5th Cir. 1980) ("[T]hat an adjutant general is a state officer does not preclude his simultaneously being a *federal agency*."); *Chaudoin* v. *Atkinson*, 494 F.2d 1323, 1329 (3d Cir. 1974) ("[T]here can be no doubt that the Adjutant General of Delaware is an agency or agent of the

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[2] As the court of appeals in the instant case explained (Pet. App. 7a), 32 U.S.C. 709(f) (formerly 32 U.S.C. 709(e) (1994)) reserves certain decisions concerning the employment of civilian technicians to the sole discretion of the Adjutant General. The courts of appeals have consistently held that "the matters explicitly reserved to the discretion of the adjutants general by section 709(f) reflect Congress's careful compromise, and thus are beyond the scope of bargaining under the [FSLMRS]." Pet. App. 7a; see *id.* at 7a-8a (citing cases). Thus, while the courts of appeals have recognized that National Guard civilian technicians are covered by the FSLMRS and are entitled to elect union representation, the *scope* of the technicians' collective bargaining rights is not necessarily coextensive with that of other covered federal employees.

United States" in administering the civilian technicians program.).

Petitioners contend (Pet. 11-19) that, except when the President exercises his authority to call National Guard units or members into federal service (see 10 U.S.C. 12405), National Guard units and personnel (including the Adjutant General) function purely as state entities. But whatever the merits of that contention as applied to other categories of National Guard personnel, it is clearly wrong with respect to the civilian technicians whose employment rights are at issue here. Under the plain terms of 32 U.S.C. 709(e), those technicians are at all times employees of the appropriate military department and of the United States, regardless of whether they or the unit(s) in which they serve have been called into federal service pursuant to 10 U.S.C. 12405. Indeed, perhaps the most striking feature of the certiorari petition is its failure to cite 32 U.S.C. 709(e), let alone to address the implications of that provision for the questions presented in this case.

2. Petitioners' claims under the Tenth and Eleventh Amendments lack merit and do not warrant this Court's review.

a. Petitioners contend that application to them of the FSLMRS would "conscript the Petitioners into administering and participating in a federal regulatory scheme." Pet. 23; see Pet. 22-23; *Printz* v. *United States*, 521 U.S. 898, 935 (1997) (holding that the federal government may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program"). Petitioners do not, however, call into question the constitutionality of 32 U.S.C. 709(d), which directs the Secretary of the Army or Air Force to designate Adjutants General "to

employ and administer the technicians authorized by" the Technicians Act. In light of their unchallenged responsibility to "employ and administer" a group of federal employees, the requirement that petitioners perform that duty in compliance with applicable federal law creates no substantial Tenth Amendment question. Cf. *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988) (distinguishing between federal laws that "regulate[] state activities" and federal laws that "seek to control or influence the manner in which States regulate private parties"; holding that the Tenth Amendment's anti-commandeering principle applies only to the latter category of laws; and noting that States and municipalities may properly be required to conform their "employment practices" to governing federal law); *Reno* v. *Condon*, 528 U.S. 141, 150-151 (2000) (relying on *Baker* in rejecting state officials' Tenth Amendment challenge to the Driver's Privacy Protection Act of 1994). Because the technicians' proper status as federal employees is acknowledged, and because petitioners do not challenge Section 709(d)'s basic directive that the Adjutant General must "employ and administer" those technicians, the ancillary federal responsibilities imposed on the Adjutant General by the FSLMRS raise no constitutional difficulties.

b. Petitioners contend (Pet. 19-22) that the FLRA order at issue here unconstitutionally impairs Mississippi's sovereign immunity from private suits. But because the relevant FLRA proceedings involve petitioners' performance of their duties as federal agencies, petitioners cannot invoke the immunity of the State. See Pet. App. 15a n.7. In any event, "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." *Alden* v.

Maine, 527 U.S. 706, 755 (1999). Thus, even if petitioners were entitled to the State's sovereign immunity, that immunity would not extend to an administrative or judicial enforcement action prosecuted by the FLRA. Although petitioners observe (Pet. 4, 20) that the FLRA investigation was triggered by the ACT's request for an election, that fact alone is insufficient to trigger the State's immunity: federal officials often (and appropriately) consider the views of private parties in determining whether to exercise their constitutional authority to file suit against a State. And while petitioners rely (see Pet. 20-22) on *FMC* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), they make no effort to demonstrate that the proceedings within the FLRA bore a functional resemblance to a suit in federal court. Compare *id.* at 756-759. Finally, even if the FLRA proceedings were regarded as the constitutional equivalent of a private lawsuit against a state entity, the Adjutant General would have no immunity from an administrative order (such as the FLRA's directive in this case that a representation election be held) that is designed to ensure prospective compliance with federal law. See, *e.g.*, *Alden*, 527 U.S. at 757; *Ex parte Young*, 209 U.S. 123 (1908).

3. Petitioners contend (Pet. 24-26) that the Fifth Circuit's ruling conflicts with numerous court of appeals decisions addressing the status of Adjutants General or state National Guard units. No such conflict exists. To the contrary, the courts of appeals that have addressed the question have uniformly held that civilian technicians within the National Guard are entitled to the protections of the FSLMRS. See pp. 6-7, *supra*. The cases on which petitioners rely are readily distinguishable.

Clark v. *United States*, 322 F.3d 1358 (Fed. Cir. 2003) (see Pet. 24-25), involved a suit filed by a member of the Alabama National Guard seeking compensation for mandatory correspondence courses that he had taken as a member of that unit. 322 F.3d at 1361. The government argued (see *id.* at 1364) that the suit was barred by 37 U.S.C. 206(d), which provides that Section 206 "does not authorize compensation for work or study performed by a member of a reserve component in connection with correspondence courses of an armed force." The court of appeals held that the statutory bar was inapplicable because the plaintiff had not been called into federal service and had taken the relevant courses as a member of the Alabama National Guard, rather than as a member of the National Guard of the United States. See 322 F.3d at 1364-1368.

Gilbert v. *United States*, 165 F.3d 470 (6th Cir. 1999), and *United States* v. *Hutchings*, 127 F.3d 1255 (10th Cir. 1997) (see Pet. 25-26), likewise presented no question concerning the status of National Guard civilian technicians. In both cases, the Guard carried out certain law enforcement duties, which were alleged to violate the Posse Comitatus Act, 18 U.S.C. 1385. The courts of appeals held that the Act bars use of the Guard's military capacity for law enforcement only when the Guard has been called into federal service. See *Gilbert*, 165 F.3d at 472-473; *Hutchings*, 127 F.3d at 1257-1258.

Clark, *Gilbert*, and *Hutchings* recognize that the status, rights, and responsibilities of individual National Guard members may vary depending on whether the relevant Guard unit has been called into federal service. None of those cases, however, involved the civilian technicians provided for in 32 U.S.C. 709, who are specifically designated as federal employees without

regard to the status, at any given time, of the larger unit in which they serve. Those decisions therefore do not conflict with the Fifth Circuit's ruling here, which holds only that petitioners act as federal agencies in performing their duty to employ and administer the civilian technicians.[3]

The cases cited in the first full paragraph on page 25 of the petition are likewise inapposite. Those cases reflect the National Guard's dual character and simply hold that a state unit of the National Guard partakes of the State's sovereign immunity from private suits when it acts in its capacity as a state entity. Those decisions do not address the authority of the FLRA to pursue an enforcement action intended to ensure that a National Guard unit and its Adjutant General comply with federal law in carrying out their duty to employ and administer federal employees.

Petitioners' reliance (Pet. 25) on *Singleton* v. *MSPB*, 244 F.3d 1331 (Fed. Cir. 2001), is also misplaced. As petitioners point out (Pet. 25), the court of appeals in *Singleton* held that the Merit Systems Protection Board (MSPB) lacked statutory authority to issue a

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[3] For similar reasons, there is no merit to petitioners' contention (Pet. 18-19) that the court of appeals' decision casts doubt on the legality, under the Posse Comitatus Act, of using National Guard personnel for domestic law enforcement purposes. The court of appeals held only that petitioners act as federal agencies in their supervision of the civilian technicians described in 32 U.S.C. 709; the court did not suggest that any National Guard unit within the State of Mississippi had been (or should be treated for purposes of the Posse Comitatus Act as having been) federalized in its entirety. Nor did the court suggest that the technicians themselves, when performing their civilian duties, should be regarded as "part of the Army or the Air Force" within the meaning of the Posse Comitatus Act.

binding order to the Adjutant General of a state National Guard, even though the case involved the Adjutant General's employment of a civilian technician. See 244 F.3d at 1333, 1336-1337. That case, however, did not present any question concerning the powers of the FLRA or the construction of the FSLMRS, and the Federal Circuit did not discuss the various court of appeals decisions (see pp. 6-7, *supra*) that have recognized civilian technicians' right under the FSLMRS to engage in collective bargaining. Indeed, the court in *Singleton* relied in part on the MSPB's own "determin[ation] that its orders are not enforceable against state national guards," *id.* at 1337—a determination that has no analogue in the instant case. Any tension between the decision in *Singleton* and the Fifth Circuit's ruling in the instant case therefore provides no basis for this Court's review.[4]

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[4] Section 518(a) of Title 28 of the United States Code provides that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." 28 U.S.C. 518(a); see 28 C.F.R. 0.20(a); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 93 (1994). Any certiorari petition filed by petitioners in their capacities as federal employers of the civilian technicians would therefore require the authorization of the Solicitor General, which has not been given in this case. Cf. *Arkansas Nat'l Guard* v. *FLRA*, No. 99-1563 (8th Cir. Aug. 30, 1999) (App. A, *infra*, 1a) (dismissing the Arkansas National Guard's petition for review of an FLRA order "because the appeal is not authorized by the Department of Justice and is not authorized or approved by the Solicitor General"); *FLRA* v. *Puerto Rico Nat'l Guard*, No. 99-1293 (1st Cir. Nov. 23, 1999) (App. B, *infra*, 3a) (holding that the United States Department of Justice "has the sole litigating authority for the [Puerto Rico National] Guard in this particular matter" because "the matter arises under the [FSLMRS], 5 U.S.C. §§ 7101

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
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FEBRUARY 2004

---

et seq., and concerns the Guard's capacity in administering a federal civilian technician's program").

In the instant case, however, petitioners do not seek review, as federal agencies, of any question concerning the substantive rights and obligations defined by the FSLMRS. Rather, petitioners' sole argument is that they are not properly regarded as federal agencies to begin with. Under those circumstances, the United States does not believe that the Solicitor General's authorization is required and therefore does not object to the filing. By contrast, in both *Puerto Rico National Guard* and *Arkansas National Guard*, the legal claims that the relevant commonwealth and state officials sought to raise went beyond the contention that they were not properly regarded as FSLMRS agencies.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1563

ARKANSAS NATIONAL GUARD, BY THE ADJUTANT GENERAL OF THE STATE OF ARKANSAS, MAJOR GENERAL DON C. MORROW, PETITIONER

v.

THE FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

Aug. 30, 1999

Petition for Review of an Order of Federal Labor Relations Authority

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JUDGMENT

After consideration of the court this appeal is dismissed for lack of jurisdiction because the appeal is not authorized by the Department of Justice and is not authorized or approved by the Solicitor General. (5361-010199)

August 30, 1999

A true copy.

ATTEST: MICHAEL E. GANS
MICHAEL E. GANS
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1293

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

PUERTO RICO NATIONAL GUARD, PUERTO RICO AIR NATIONAL GUARD, SAN JUAN, PUERTO RICO, RESPONDENT

Entered: Nov. 23, 1999

ORDER OF COURT

Before: SELYA, *Circuit Judge*, CYR, *Senior Circuit Judge* and LIPEZ *Circuit Judge*.

The Federal Labor Relations Authority ("Authority") has filed an application for summary enforcement of its May 15, 1998 order against the Puerto Rico National Guard and the Puerto Rico Air National Guard (collectively, "the Guard"). In the event that we deny the application and order full briefing, the Authority requests that we direct the Guard to file the opening brief. *Cf.* Fed. R. App. P. 15.1 (providing that in enforcement cases filed by the National Labor Relations Board, the party adverse to the Board proceeds first on briefing).

Unfortunately, the matter has been complicated by the fact that two different sets of attorneys—the Commonwealth of Puerto Rico Department of Justice ("PR-DOJ") and the United States Department of Justice ("US-DOJ")—have entered appearances in this court purporting to represent the Guard. In addition, the two different sets of attorneys have filed separate Answers that differ in fundamental ways. Not surprisingly, the Authority requests that the issue of representation be resolved.

We are persuaded that the US-DOJ has the sole litigating authority for the Guard in this particular matter because the Guard is being sued in its capacity as a federal agency. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party or is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."). In particular, the matter arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101 et seq., and concerns the Guard's capacity in administering a federal civilian technician's program. *Cf. Gilliam* v. *Miller*, 973 F.2d 760, 762 (9th Cir. 1992) ("We agree that the [Oregon Adjutant General's] personnel actions as supervisor over the federal civilian technicians are taken in the capacity of a federal agency."). Accordingly, we hereby strike the Answer filed by the PR-DOJ.

However, we are also persuaded that the issues are sufficiently complicated that summary enforcement is inappropriate, and that the case should proceed to full briefing. The parties shall fully address the issues raised in the US-DOJ Answer including (1) the Guard's suggestion that our review is not foreclosed by the fact

that it failed to file exceptions to the ALJ's decision; and (2) the Guard's contention that this court should exercise its equitable discretion not to enforce the order.

The Guard shall proceed first on briefing, and its brief shall be filed by December 23, 1999. The Authority's brief shall be filed within thirty days after the Guard's brief is filed. Any reply brief must be filed with fourteen days after service of the Authority's brief.

So ordered.

By the Court:

/s/ PHOEBE MORSE
PHOEBE MORSE, Clerk

No. 03-737 (4)

Supreme Court, U.S.
FILED
MAR 1 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MAJOR GENERAL HAROLD A. CROSS, in his official capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as Executive Head of the Mississippi Military Department and the Mississippi Militia, the Mississippi National Guard and the Mississippi Military Department,

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region and LINDA J. NORWOOD, in her former official capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF TO RESPONDENTS' OPPOSITION

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March 1, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 03-737

MAJOR GENERAL HAROLD A. CROSS, in his official capacities as the Adjutant General of the State of Mississippi, of the Mississippi Militia, of the Mississippi National Guard, and as Executive Head of the Mississippi Military Department and the Mississippi Militia, the Mississippi National Guard and the Mississippi Military Department,

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, in her official capacity as Regional Director of the Federal Labor Relations Authority, Atlanta Region and LINDA J. NORWOOD, in her former official capacity as Acting Regional Director of the Federal Labor Relations Authority, Atlanta Region,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF TO RESPONDENTS' OPPOSITION

REPLY ARGUMENT

1. Respondents cleverly misfocus their argument on the status of Military Technicians,[1] rather than the status of the

[1] Respondents repeatedly argue that this case involves "civilian" employees. *E.g.*, Opp. at 6 n.1. However, the undisputed proof in the record establishes that Military Technicians: maintain and operate military weapons systems and equipment; fly military aircraft; handle ordinance and other explosives; run live fire ranges; and perform other duties

Mississippi Guard and its Adjutant General. However, the dispositive issue in this case is not the status of Military Technicians. Rather, the issue is whether the FLRA—a federal instrumentality—has the statutory and constitutional authority to issue coercive orders and sanctions against these state military actors when they are in a state command status. It is ironic indeed that the FLRA would contend it has such power, when the President himself does not.

In order to support their contention, Respondents suggest that while a state Adjutant General is a state officer, that fact does not prevent him from *simultaneously* holding the capacity of a federal executive agency. In order to reach this conclusion, Respondents intentionally ignore *Perpich v. DOD*, 496 U.S. 334 (1990), which plainly held that Guardsmen "[n]ow must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—*only one of which is worn at any particular time.*" *Id.* at 348 (emphasis added). Respondents utterly fail to explain how a state Guard and its Adjutant General can *simultaneously* hold a state and federal capacity, consistent with *Perpich*.

2. Respondents' Opposition is as telling for what it does not say, as for what it does. For example, it is well established that, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)(quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Yet in their discussion of the dispositive statutory construction issue - whether 5 U.S.C. § 7103(a)(3) and 5 CFR § 2421.4 render the Adjutant General and the Mississippi Guard "[a]n Executive

---

indisputably military in nature. App. I, 103a-104a. In light of these facts, to characterize Military Technicians as "civilians" is inaccurate.

agency" or "[a]ctivity" of an "[a]n Executive agency"—Respondents make no mention of this Plain Statement Rule of statutory and constitutional law.

Likewise, Respondents make no attempt to explain how the Fifth Circuit's admission that "[t]he broad and somewhat circular terms of the statutory definitions of agency and Executive agency are *non-dispositive* in resolving the specific question that this appeal presents" 12a-13a n. 6 (emphasis added), can possibly comply with the Plain Statement Rule. Rather than fall into the "nondispositive" statutory "thicket" conceded by the Fifth Circuit *Id.* & 9a, Respondents attempt to jump over it, by misfocusing on the Technicians Act, rather than 5 U.S.C. § 7103(a)(3) and 5 CFR § 2421.4—which are the provisions at issue here.

3. In that regard, Respondents place great emphasis on 32 U.S.C. § 709(e). Yet that statute does not designate Petitioners as a federal executive agency, and further is not even part of the FSLMRA, which is the Act at issue here. Additionally, there is a significant difference between section 709's statutory *retention* of previously existing state authority over these formerly state personnel (caretakers and clerks), with the FLRA's dragooning of these state actors to involuntarily participate in a collective bargaining scheme. *See NeSmith v. Fulton*, 615 F.2d 196, 200 (5th Cir. 1980) (emphasis added) (citation omitted) ("[t]he legislative history of the National Guard Technicians Act explicitly states that the Act provides for the exercise of the adjutant general's administrative authority over the technician program to *remain* 'as a matter of law . . . at the State level'").

Further, section 709 contains no mention of unions or the FLRA, thus undermining Respondents' Tenth Amendment argument. In any event, Respondents fail to acknowledge that section 709 was enacted pursuant to Congress' Article I Second Militia Clause authority. This is important, as under

Kimel v. Florida Board of Regents, 528 U.S. 62, 78 (2000), Congress lacks any authority under its Article I powers to pierce a state actor's sovereign immunity.

4. Respondents seek to circumvent *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) with three arguments. First, they contend that FLRA proceedings are brought by the Federal Government, and therefore do not fall within Eleventh Amendment proscriptions. Yet *South Carolina* rejected this very argument, finding that such a procedure "[d]oes not retroactively convert a [federal administrative] adjudication initiated and pursued by a private party into one initiated and pursued by the Federal Government." *Id.* at 764.

Apparently realizing that argument will not succeed, Respondents then contend that FLRA proceedings are not sufficiently adversarial to fall within the proscriptions of *South Carolina*. Even overlooking the fact that such proceedings very well could lead to stigmatizing unfair labor practices charges and orders, such an argument is contrary to *South Carolina*, which held that, "[t]he primary purpose of sovereign immunity is not to protect state treasuries, . . . but to afford the States the dignity and respect due sovereign entities. As a result, . . .' the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *South Carolina*, 535 U.S. at 765-66 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996)).

5. In sum, Petitioners respectfully submit that the Fifth Circuit's decision below threatens to warp the carefully crafted Congressional and constitutional scheme delineating the respective spheres of state versus federal military power. As evidenced by *Perpich*, it is very important—as a matter of Federalism and constitutional law, as well as the inter-

workings of the Guard and the Active Components—that the distinctions of authority and jurisdiction between the federal military and each state's militia be maintained.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

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March 1, 2004

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No. 03-737

Supreme Court, U.S.
FILED
DEC 22 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MAJOR GENERAL JAMES H. LIPSCOMB III, IN HIS OFFICIAL CAPACITIES AS THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI, OF THE MISSISSIPPI MILITIA, OF THE MISSISSIPPI NATIONAL GUARD, AND AS EXECUTIVE HEAD OF THE MISSISSIPPI MILITARY DEPARTMENT AND THE MISSISSIPPI MILITIA, THE MISSISSIPPI NATIONAL GUARD and THE MISSISSIPPI MILITARY DEPARTMENT,

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, IN HER OFFICIAL CAPACITY AS REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION AND LINDA J. NORWOOD, IN HER FORMER OFFICIAL CAPACITY AS ACTING REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL GUARD ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the Federal Labor Relations Authority has the power to order state National Guards and their state Adjutants General* to participate in federal union representation elections concerning Guard personnel.

Whether the valuable Tenth and Eleventh Amendment rights of a state official and a state agency may be trumped by federal statute, when Congress lacks the constitutional authority to pierce those immunities with its Article I powers.

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* As explained by Petitioners, Adjutants General are the senior military commander of each state's National Guard. They are the National Guard analogue to the Chairman of the Joint Chiefs of Staff in the federal military.

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BRIEF OF THE NATIONAL GUARD ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE* [1]

This Amicus Curiae Brief is filed by the National Guard Association of the United States, or NGAUS, an organization that strives to enhance the readiness of each state's National Guard and to ensure that they meet their essential goal as full partners in the conventional forces defending our Nation. NGAUS was created in 1878 to provide united National Guard representation before Congress. In the first constructive meeting of officers from the North and South after Reconstruction, the organizational meeting of NGAUS had the goal of obtaining better equipment, standardized training, and a more combat-ready force by petitioning Congress for resources. Today, well over a century later, NGAUS has the same mission.

According to its by-laws, the purpose of NGAUS is "to promote the national security of the United States of America." NGAUS is comprised of commissioned officers and warrant officers of each state and territory's Army and Air National Guard who are concerned about the role of the Guard, as well as a continuation of a strong militia in the Total Force construct. One key part of achieving this goal includes striving to ensure the successful continuation through promotion of the unique, historic dual federal and

---

[1] Pursuant to Supreme Court Rule 37.2(a), NGAUS states that the Parties to this appeal have consented to the filing of this amicus brief. Pursuant to Supreme Court Rule 37.6, NGAUS states that counsel for Petitioners did assist NGAUS' counsel in the preparation of this brief, and that no person or entity other than NGAUS made any monetary contribution to the preparation or submission of this brief.

state missions of each state and territory's Guard, so to further their goals and mission.

NGAUS has participated in litigation when it believed that a national interest is was stake or that the issue of states' rights was at risk. In the big picture, this means ensuring that the line of demarcation between federal and state power does not become blurred or worse, progressively inched further toward federal domination. This delicate balance of power is threatened by the decisions below in this case in a way that directly affects the goals and purposes of the NGAUS.

SUMMARY OF ARGUMENT

This case presents an issue of national importance, whether the FLRA has the power to order state National Guards and their state Adjutants General to participate in federal union representation elections concerning Guard Technician personnel. The resolution of this question has an importance far exceeding the impact of potential unionization on a certain class of Guard personnel.

First, in order to answer the question in the affirmative, the Fifth Circuit and district court below had to find that state Guards and their Adjutants General act in a federal capacity, even though in a state command status, when administering Guard Technicians. This finding threatens the carefully crafted state/federal Guard balance, in a manner detrimental to our federal system and contrary to this Court's holding in *Perpich v. DOD*, 496 U.S. 334, 345 (1990).

Second, the decisions below will, as suggested by Petitioners, have unintended and negative national security consequences. The Fifth Circuit's holding that a state Guard in a state command status can be a federal agency and part of the National Guard of the United States—a separate entity that is a federal reserve component—threatens to criminalize the use of the each state's Guard for counterterrorism and

domestic law enforcement operations under the *Posse Comitatus* Act, 18 U.S.C. § 1385, at a time when this Nation is at war. NGAUS respectfully submits that this result, while surely unintended by the Court of Appeals below, is alone sufficient cause for the grant of a writ of certiorari in this case.

ARGUMENT

NGAUS adopts and reasserts the arguments offered by Petitioners, but would supplement and emphasize those as follows:

I. THIS COURT SHOULD GRANT THE WRIT TO UNDO THE HARM TO OUR CAREFULLY CRAFTED FEDERAL SYSTEM CAUSED BY THE FIFTH CIRCUIT'S FINDING THAT A STATE ADJUTANT GENERAL AND STATE NATIONAL GUARD CAN BE FEDERAL EXECUTIVE AGENCIES WHILE IN A STATE COMMAND STATUS.

The Fifth Circuit's decision in this case misapplied the carefully crafted Congressional and constitutional scheme delineating the respective spheres of each state's National Guard and the federal government. Ignoring *Perpich v. DOD*, 496 U.S. 334, 345 (1990), as well as the National Guard statutory scheme, the Fifth Circuit found that the Mississippi Guard and its Adjutant General are federal/state "hybrids"—a finding that infects the entire decision and allowed the court below to avoid addressing the major constitutional issues at stake.

Mississippi, as well as every state in the Union, has a state militia. The Mississippi Militia, of which Petitioner the Mississippi Guard is a subset, is composed of the "[n]ational guard, the Mississippi State Guard, and the unorganized militia." Miss. Code Ann. § 33-5-1. Pursuant to Miss. Code

Ann. § 33-1-1(d) the "Mississippi National Guard [means] that part of the organized militia of this state which is organized, equipped and federally recognized under the provisions of the laws of the United States and of the State of Mississippi relating to the National Guard." *Id.*

The Governor of Mississippi, not the President of the United States, is the Commander in Chief of the Mississippi National Guard (unless impressed into federal service). Miss. Code Ann. § 33-3-1; Miss. Const. art. V, § 119. This is because, unless called forth by the President under federal law, the respective states' National Guards are state militias, not federal military entities. *Perpich v. DOD*, 496 U.S. 334, 350-51 (1990) (recognizing that the militias are state entities).

The concept of the state militias pre-dates even that of the United States or its Constitution. Further, the Founding Fathers recognized the need for a militia and addressed it in Article I, Section 8 of the Constitution, which provides:

> The Congress shall have power. . . . ;
>
> (15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> (16) To provide for organizing, arming, and disciplining the Militia, and for governing such Part of that as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, the Authority of training the Militia according to the discipline prescribed by Congress;

U.S. Const., art. I, § 8, cls. 15 & 16.

The records of the Constitutional Convention indicate that the Founding Fathers were much concerned about the balance of federal versus state power in the Union and wanted to ensure that the states retained appropriate control over their militias. After much debate, the majority of the drafters decided that the federal government should not have complete

power over militia matters and appropriately reserved certain control to the states. Thus, in striking a balance between local and national control, the Constitution provides for a militia with dual control, alternating between federal and state, under particular circumstances. *The Militia Clauses, A National Guard, Federalism: A Constitutional Tug Of War*, 57 George Washington Law Review 3-28, 3-32 (Dec., 1988)(quoting the *Records of the Federal Convention of 1787*, at 293 M.(Farrand Ed. 1911)).

The dual control concept has continued unabated to this day. Yet Congress has over the years modified the statutory scheme governing the Guard, so as to streamline its use by the Nation in times of war or crisis.

For example, following certain problems associated with the Spanish-American War, Congress enacted statutory amendments which were known as the Dick Act, of January 21, 1903, 32 Stat.775, in which Congress exercised its power to organize the militia. The Dick Act provided for an organized militia to be known as the "National Guard" which would conform to a regular army organization, be equipped through federal funds, and be trained by regular army instructors. *Perpich*, 496 U.S. at 342.

In 1918, a provision of the National Defense Act which allowed the federal government to draft Guardsmen for overseas assignments was upheld in the *Selective Draft Law Cases*, 245 U.S. 366, 368 (1918). In these cases, certain members of the National Guard challenged the provision of the National Defense Act which allowed the President to draft individuals for service overseas. In its opinion, this Court reasoned that the Militia Clauses were not to be read as a limitation on Congress' general war clause power. Importantly, the National Defense Act as interpreted by this Court anticipated the concept which would be later known as the "dual nature of the guard."

In 1933, Congress created a new and separate federal entity, to be known as the National Guard of the United States. *Perpich*, 496 U.S. at 345. To expand federal authority for activation of individual Guardsmen, and to remove lingering doubts about the constitutionality of Guard deployments overseas, each Guardsman on induction was now required to assume dual statuses. That is, every Guardsman was to be a potential[2] federal reservist as well as a member of their state's militia. *Id.* at 345-46.

The modern dual status Guard system was codified in 1952 in the Armed Forces Reserve Act. Pub. L. 82-476, 66 Stat. 481 (1952), which provided that Guardsmen could be called out by the President for fifteen days each year for any reason, subject to the consent of their governor. The requirement for gubernatorial consent was contested in later years as the role of the Guard expanded, particularly in an area of overseas operations which were removed from the continental United States. As a result certain governors refused to allow their National Guard units to participate in certain overseas operations. In response to these local restrictions, the Montgomery Amendment of 1986, Pub. L. 99-661 § 522, 100 Stat. 3(A)16. (1986) (codified at 10 U.S.C. § 672 (f) Sub 4 (1986)), was enacted, removing the requirement of gubernatorial consent for federal training by the National Guard. *Perpich*, 496 U.S. at 346.

A dispute over the constitutionality of the Montgomery Amendment came to a head in *Perpich v. DOD*, 496 U.S. 334

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[2] While all Guardsmen are required to also enlist in the separate federal reserve component entity - the National Guard of the United States - federal law does not require them to maintain that membership in order to remain a member of their state's Guard. Thus, there are Guardsmen who do not hold "federal recognition," yet remain members of their state's Guard. *E.g., Zitser v. Walsh*, 352 F. Supp. 438, 440 (D. Conn. 1972) ("One may be a member of the National Guard of a state without receiving federal recognition, but never the reverse").

(1990). In *Perpich*, the Department of Defense had ordered several state National Guard units to serve on active duty in Central America. Some state governors opposed these out-of-country federal missions and refused to consent to the deployments. As the Montgomery Amendment negated the effect of the governors' veto and allowed the deployment of Guard personnel overseas, Governor Perpich of Minnesota sued the Department of Defense alleging that it could not deploy the Minnesota guardsmen without gubernatorial consent. In a unanimous decision, this Court upheld the constitutionality of the Montgomery Amendment.

Perpich is key to the instant case, not because of its holding on gubernatorial consent, but because it carefully explained and delineated the state versus federal status of the Guard, as well as Guardsmen. *Perpich* makes it clear that National Guardsmen are now members of two legally distinct and separate organizations—their state's Guard and the separate National Guard of the United States, a federal reserve component. *Id.* at 347 & 347 n.19. This dual system requires state National Guard members to simultaneously enroll in their state's militia as well as the National Guard of the United States. 10 U.S.C. §101 (11) & (13).

The implication of this dual system is the key to this case; it means that each member of the National Guard of the United States when on federal active duty is relieved from duty in the National Guard of his state from the effective date of the federal duty order, and remains a federal soldier until the individual is relieved from that duty. At the time the individual is relieved from federal duty, he or she reverts back to the membership in the state Guard unit. 32 U.S.C. § 325(a).

Most importantly, however, *unless and until* ordered to active duty in the Army or Air Force, National Guard members retain their state status as members of their separate state Guard unit. *Perpich,* 496 U.S. at 345. As Justice

Stevens explained, Guardsmen "[n]ow must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—*only one of which is worn at any particular time.*" *Id.* at 348 (emphasis added). This is "dual" status, not "hybrid" status.

In sum, as this Court has previously found, unless federalized, Guardsmen serve in their state capacity as state militiamen:

> It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States makes it apparent that military members of the Guard are employees of the States. . . .

Maryland ex rel. Levin v. United States, 381 U.S. 41, 48 (1965), *vacated on other grounds*, 382 U.S. 159 (1965). Likewise, each state's Guard is itself a state agency. *E.g.*, *Jones v. New York State Div. of Military Affairs*, 166 F. 3d 45, 49 (2d Cir. 1999) (New York Guard is state entity); *Hefley v. Textron, Inc.*, 713 F. 2d 1487, 1493 (10th Cir. 1983) (Guard "[i]s an arm of the state and entitled to any immunity which the state possesses. . .").

Guardsmen can also be impressed by the President directly into federal service. *E.g.*, 10 U.S.C. §§ 331-333 & 12406 (authorizing executive officials to call forth the militia of the States). Finally, they can be mobilized to active duty in the federal military through their membership in the separate federal reserve component, the National Guard of the United States. *Perpich*, 496 U.S. at 350 n.21 (recognizing that "Congress has by different statutes provided for activating the National Guard of the United States and for calling forth the militia, including the National Guards of the various States").

Thus, the above discussed Titles 10 and 32 Guard statutory scheme, as well as *Perpich*, make it clear that an Adjutant General and a state Guard's status at any given time is a function of who has command authority, a governor or the President. This is because, in the context of the Guard, whether one is in a state or federal status "[d]epends ***solely*** on whether command of the Guardsman has been taken away from a state's governor by one authorized to do so by Congress." *United States v. Hutchings*, 127 F. 3d 1255, 1258-59 (10th Cir. 1997). (emphasis added); *accord Gilbert v. United States*, 165 F. 3d 470, 473 (6th Cir. 1999) (quoting B. Rich, *The National Guard and Posse Comitatus*" 1994 Army Law 16, 19 ("'[t]he issue of status depends on command and control and not on whether: state or federal benefits apply; state or federal funds are being used; the authority for the duty lies in state or federal law; or any combination thereof'")).

Here, the Fifth Circuit's finding that the Adjutant General and the Mississippi Guard are "hybrids" that can simultaneously hold both a state and federal status, is directly contrary to the holding of *Perpich*, 496 U.S. 345-46, that Guardsmen cannot—as a matter of law—wear a state and a federal hat *at the same time*. This mutually exclusive duality is important, because, as pointed out by Petitioners, the state status of nonfederalized Guardsmen is a "[c]onstitutional aspect" of their service. *Perpich*, 496 U.S. at 349.

The Fifth Circuit's decision in this case threatens this carefully crafted Congressional and constitutional scheme delineating the respective spheres of state versus federal military power. It also runs contrary to the Founding Father's vision for dual control of the militia.

Simply put, it is very important—both as a matter of Federalism, as well as the interworkings of the Guard and the Active Components—that the demarcation line of authority between the federal military and each state's militia be

maintained. For this reason, NGAUS respectfully submits that a writ of certiorari should be granted to review and overturn the decision below, which mistakenly conflated the mutually exclusive state versus federal statuses of each state's Guard and Adjutant General.

II. THIS COURT SHOULD GRANT THE WRIT TO PREVENT HARM TO NATIONAL SECURITY CAUSED BY THE POTENTIAL INTERACTION OF THE DECISION BELOW AND THE *POSSE COMITATUS* ACT.

If left undisturbed, the Fifth Circuit's decision will harm national security. It should go without saying that this Nation is at war on multiple fronts. Not only are American troops fighting in Afghanistan and Iraq, the War on Terrorism has tragically reached our own soil. In this post-9/11 world, each state's National Guard is playing a critical role in this War.

This fact is important, because generally speaking, the *Posse Comitatus* Act prohibits the use of "[a]ny *part* of the [federal] Army or Air Force as a posse comitatus or otherwise to execute the laws. . ." 18 U.S.C. § 1385 (emphasis added). For this reason, with some limited exceptions, federal troops cannot be used in certain types of domestic operations.

However, under the *Posse Comitatus* Act, it has long been accepted that the Guard—because it is not a *part* of the federal military—is not prohibited from engaging in domestic operations. Recognizing that, since 9/11 thousands of Guardsmen across the Nation have engaged in critical counterterrorism and law enforcement operations, while in a state status. For example, and as pointed out by Petitioners, in the post-9/11 period, Guardsmen were detailed as security at airports nationwide. Further, many states have used Guardsmen to protect nuclear and other key infrastructure facilities from terrorist attack. Importantly, these Guardsmen have served these missions in a state status—as members of

their respective states' Guards—so as not to violate the *Posse Comitatus* Act's prohibition on certain domestic operations by federal troops.

Here, the Fifth Circuit's holding that a state National Guard is a federal agency and part of the National Guard of the United States, threatens to criminalize the use of the states' Guards for these and certain other domestic operations. This is because under 10 U.S.C. § 3062(c), the National Guard of the United States is indisputably part of the Army.

Thus, if the Fifth Circuit's finding that the states' National Guards are a subpart of National Guard of the United States stands, some may well contend that use of state National Guards for certain domestic counterterrorism and law enforcement operations is a felony. *See Clark v. United States*, 322 F.3d 1358, 1367 (Fed. Cir. 2003) ("To include a National Guard member in a reserve component ...when he is in service to the state National Guard would be to treat that member as a federal employee, and not as a state serviceman, and would be contrary to [Posse Comitatus]").

Such a result, especially with this Nation at war on our own soil, would seriously damage national security. NGAUS respectfully submits that avoidance of this result alone justifies the grant of a writ of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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